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FILED
DISTRICT COURT OF GUAM

DEC 28 2007

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**UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM**

UNITED STATES OF AMERICA)	CIVIL CASE NO 06 00030
)	
Plaintiff)	OPPOSITION OF THE UNITED
)	STATES TO DEFENDANT'S MOTION
vs)	TO DISMISS FOR LACK OF SUBJECT
)	MATTER AND IN REM
)	JURISDICTION
MARSHALLS 201)	
)	
Defendant)	
)	

The Defendant s Motion to Dismiss is a pernicious ploy to distract this Court from the
Defendant s clear violation of United States law by challenging well founded United States
authority to establish its Exclusive Economic Zone

TABLE OF AUTHORITIES

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16	Exclusive Economic Zone and Maritime Boundaries	
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12	Restatement (Third) of the Foreign Relations of the United States § 326 (1987)	10

1 The Defendant's sweeping arguments must fail for several reasons. First, the Defendant
2 does not have standing to assert violations of international law. Second, even if the Defendant
3 did have such standing, the Defendant's international law arguments are idiosyncratic
4 unsupported and simply wrong. They fly in the face of the practice of States, including Kiribati
5 which has not objected to the United States' exercise of its jurisdiction in its Exclusive Economic
6 Zone adjacent to Howland and Baker Islands. This court should reject the Defendant's
7 arguments, which if accepted by this Court would lead to a massive loss of jurisdiction by both
8 the United States and many other island nations in the Pacific such as the Northern Marianas
9 Islands (NMI), the Marshall Islands, the Federated States of Micronesia, Palau, and Kiribati.

12 **I. FACTUAL BACKGROUND**

13 The facts are straightforward. The United States Coast Guard caught Defendant fishing
14 illegally in the United States Exclusive Economic Zone generated by Howland and Baker Islands
15 on September 6, 2006.

16 Howland and Baker Islands form an important element in the U.S. Pacific Insular Areas.
17 They have interesting and rich pasts, an important present, and it is anticipated a valuable
18 future. They are of significant size (Baker is 1.4 square kilometers and Howland is 1.84 square
19 kilometers). Amelia Earhart disappeared while flying to a runway at Howland. Baker joined the
20 American Family in 1857. Both islands had a role in the early days of Whale hunting. The
21 islands' guano deposits were mined by United States and British companies during the second
22 half of the 19th Century. The islands were inhabited between 1935 and 1942 by Hawaiian
23 students from Kamehameha School as part of an enthusiastic project that ended when the
24 Japanese threatened the area at the start of World War II. The U.S. Coast Guard used the islands
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1 during the War. Today, the islands are part of a U.S. National Wildlife Refuge whose office is
2 in Honolulu. The refuge provides nesting and roosting habitat for about 20 species of seabirds
3 and shorebirds. Threatened sea turtles and endangered hawksbill sea turtles forage in the shallow
4 waters of the reef with hundreds of species of fish, corals, and other invertebrates. Baker Island
5 presently hosts a day beacon for navigation and an abandoned runway. Visitation is by special
6 use permit.
7

8
9 On September 7, 2006, law enforcement personnel from the National Oceanic and
10 Atmospheric Administration (NOAA) were conducting a fisheries patrol aboard a United States
11 Coast Guard (USCG) aircraft. The purpose of this patrol was to conduct surveillance of the
12 Exclusive Economic Zone (EEZ)¹ of the United States adjacent to the United States National
13 Wildlife Refuges of Howland and Baker Islands in order to detect illegal fishing activity. During
14 that flight, law enforcement personnel sighted a 215-purse seiner later identified as the F/V
15 MARSHALLS 201 at coordinates 02 29 0S 176 45 0W, a position within the EEZ of the United
16 States. At that time, the vessel's boom was lowered and its purse seine fishing net was not
17 covered or properly stowed, as prohibited by the Magnuson-Stevens Fishery Conservation and
18 Management Act (Magnuson Act), 16 U.S.C. § 1857 (4)(A) and (B). During this flight patrol
19
20
21

22 ¹ The EEZ of the United States was established by Presidential Proclamation No. 5030 (March 10, 1983) creating
23 an area of ocean over which the United States exercises exclusive jurisdiction and sovereign right for the purpose of
24 exploring, exploiting, conserving and managing natural resources. The outer limits of the EEZ are 200 nautical
25 miles from the baseline from which the U.S. territorial sea is measured, unless otherwise specified. The specific
26 coordinates for the U.S. EEZ adjacent to Howland and Baker Islands are published by the U.S. Department of State in
27 the Federal Register on August 23, 1995, 60 F.R. 43825. However, under the Magnuson Act, the United States has
28 claimed an exclusive fishery zone around these islands since 1977 (EEZ of the U.S., Presidential Proclamation No.
5030, 42 F.R. 12937-40 (March 7, 1977)).

F/V is the designation for Fishing Vessel.

1 two additional foreign fishing vessels were detected within the EEZ adjacent to Howland and
2 Baker Islands. They were the F V KOO S 101 and the F V KOO S 108.

3
4 On September 9, 2006, a second aircraft patrol was conducted by the USCG and NOAA
5 law enforcement personnel. The F V MARSHALLS 201 was again observed this time at
6 position 02 06 1S 176 00 5W, approximately 1.9 nautical miles within the EEZ adjacent to
7 Howland and Baker Islands. At the time of the sighting, the vessel was actively fishing with
8 approximately 10% of its net in the water filled with fish. In addition, two small tender vessels
9 were assisting with the retrieval of the net. Fishing within the U.S. EEZ by a foreign fishing
10 vessel without authorization of NOAA is prohibited by the Magnuson Act, 16 U.S.C. § 1857(2).
11 The USCG aircrew immediately contacted the USCG Cutter WALNUT (WALNUT) to intercept
12 and conduct a boarding on the FV MARSHALLS 201. The WALNUT was also in the area
13 conducting a fisheries patrol.

14
15 Approximately seventy minutes later, the WALNUT arrived on scene and USCG
16 personnel detected the F V MARSHALLS 201 both visually and by radar. The WALNUT's radar
17 identified the vessel's position at 02 05 38S 175 59 25W, a position approximately 2 nautical
18 miles inside the U.S. EEZ. The lookout on the WALNUT reported seeing the vessel hauling in
19 its purse seine fishing net containing fish as the two small tender vessels were in the water
20 assisting the retrieval of the net. Once it was determined the F V MARSHALLS 201 was actively
21 fishing within the EEZ, both the WALNUT and the USCG aircrew continuously attempted to
22 hail the F V MARSHALLS 201 via radio and ordered the vessel to heave to and prepare to be
23 boarded. The F V MARSHALLS 201 failed to comply with this command, and five minutes after
24 the arrival of the WALNUT, the F V MARSHALLS 201 fled towards the EEZ boundary line.

1 with her nets still hanging from the boom. The WALNUT began in immediate pursuit. After
2 several minutes, the WALNUT hauled up the flag hoist. LIMA, a black and yellow checkered
3 flag which is the internationally recognized signal code flag for "stop instantly." They also
4 sounded the signal from the International Code of Signals on their starboard vanguard for LIMA
5 with the ship's whistle. The F/V MARSHALLS 201 responded with two short blasts and
6 continued its hasty departure out of the U.S. EEZ.
7

8
9 After approximately twenty minutes, the F/V MARSHALLS 201 exited the U.S. EEZ
10 with the WALNUT maintaining hot pursuit. Someone aboard the F/V MARSHALLS 201
11 eventually responded to the hailing by the USCG via radio by stating "no speak English" and
12 "me no inside work" several times. Eight minutes after exiting the U.S. EEZ, the vessel stopped
13 briefly while the crew of the F/V MARSHALLS 201 finished stowing her gear and tender
14 vessels, but she quickly resumed making way away from the U.S. EEZ boundary line. During this
15 time, the commanding officer of the WALNUT ordered the 50 caliber machine guns to be
16 mounted, though they were not pointed at the F/V MARSHALLS 201 at any time. Within
17 minutes, the F/V MARSHALLS 201 came to full stop in the water, and someone on board the
18 vessel radioed "you come over my boat."
19

20
21 A boarding team from the WALNUT boarded the F/V MARSHALLS 201 and
22 immediately secured the vessel for an investigation into the illegal fishing activity. The boarding
23 team identified thirty-six crew members on board the F/V MARSHALLS 201. During the
24 investigation, it was determined that: 1) the Captain of the vessel was Mr. Wen Yuch Lu (Captain
25 Lu), a Taiwanese citizen; 2) the F/V MARSHALLS 201 did not possess a permit to fish within
26
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28

1 the U S EEZ and 3) the vessel caught 110 metric tons of tuna from the illegal fishing set on
2 September 9 2006

3
4 On September 10 2006 law enforcement personnel of the WALNUT seized the F V
5 MARSHALLS 201 and her catch and began escorting the vessel to Guam The vessel was
6 escorted by the WALNUT until relieved by the USCG Cutter SEQUOIA on September 16 2006

7 A boarding team from the SEQUOIA relieved the boarding team from the WALNUT in
8 order to escort the F V MARSHALLS 201 to Guam and conduct additional investigation During
9 that investigation Captain Lu began to make voluntary unsolicited statements in broken English
10 to the boarding team Captain Lu stated that he was not fishing inside the line but had set his
11 gear three miles outside the line and had then drifted inside the line while hauling his gear
12

13 On September 20 2006 the SEQUOIA reached port in Guam and secured the F V
14 MARSHALLS 201 at the Cassamar Pier in Apra Harbor A complete survey of the vessel and
15 catch of tuna was completed which estimated the current market value of the vessel to be
16 \$2 650 000 and the current market value of the tuna on board to be \$350 000
17

18 On October 10 2006 the United States filed a Complaint for Forfeiture of the vessel and
19 catch based on the two violations of the Magnuson Act On October 13 2006 a release bond for
20 \$2 950 000 was filed in the forfeiture matter and the vessel departed Guam soon thereafter
21

22 The F V MARSHALLS 201 is registered in the Republic of the Marshall Islands and is
23 owned by the Marshall Islands Fish Company (Claimant or MIFCO) MIFCO has just two
24 shareholders the Koo s Fishing Company and the Marshall Islands Marine Resources Authority
25 (a division of the Government of the Republic of the Marshall Islands) Koo s Fishing Company
26 is registered in the Republic of the Marshall Islands with offices in Majuro Republic of the
27
28

1 Marshall Islands and Taipei Taiwan

2 **II THE LAWS OF THE UNITED STATES**

3
4 The Magnuson Stevens Fishery Conservation and Management Act (Magnuson Act)
5 was enacted into law in 1994 Public Law 94 265 and was amended in 1996 16 U S C § 1801
6 et seq. In its findings at §2 it specifically mentioned among others the highly migratory
7 species of the high seas and that (i)f placed under sound management before over fishing has
8 caused irreversible effects the fisheries can be conserved 16 U S C § 1801 (a) (4) & (5)
9 Sustainable Fisheries Act Public Law 104 297 (1996) ⁴ The Pacific Insular Areas are one of the
10 focal points of the Magnuson Act Pacific Insular Areas contain unique historical cultural
11 legal political and geographical circumstances which make fisheries resources important in
12 sustaining their economic growth 16 U S C § 1801 (a) (10)
13
14

15 The Act specifically places jurisdiction for enforcement of the EEZs for the Pacific
16 Insular Areas substantially in the U S District Court for the District of Guam 16 U S C § 1861
17 Sec. 301 (d)
18

19 ³ The Fishery Conservation and Management Act of 1976 was first enacted March 1 1977 and the Federal Register
20 Notice was published March 7 1977

21 ⁴ The relevant section state (4) International fishery agreements have not been effective in preventing or
22 terminating the over fishing of these valuable fishery resources. There is danger that irreversible effect from over
23 fishing will take place before an effective international agreement on fishery management jurisdiction can be
24 negotiated signed ratified and implemented (5) Fishery resources are finite but renewable. If placed under sound
25 management before over fishing has caused irreversible effects the fisheries can be conserved and maintained so as
26 to provide optimum yields on a continuing basis

27 JURISDICTION OF COURTS In the case of Guam or any possession of the United States in the Pacific Ocean
28 the appropriate court is the United States District Court for the District of Guam except that in the case of American
Samoa the appropriate court is the United States District Court for the District of Hawaii and except that in the case
of the Northern Mariana Islands the appropriate court is the United States District Court for the District of the
Northern Mariana Islands 16 U S C § 1861 Sec. 301 (d) (Emphasis Added)

1 The term "Pacific Insular Area" is defined to mean "American Samoa, **Guam**, the
2 Northern Mariana Islands, **Baker Island**, **Howland Island**, **Jarvis Island**, **Johnston Atoll**,
3 **Kingman Reef**, **Midway Island**, **Wake Island**, or **Palmyra Atoll**, as applicable, and includes
4 all islands and reefs appurtenant to such island, reef, or atoll." 16 U.S.C. § 1801, Sec. 3 (30)
5 (those areas under Guam's District Court in bold)

6
7 This places the bulk of the United States' EEZ in the Pacific Insular Area within the
8 jurisdiction of the District Court on Guam. The islands stretch across a geographic constellation
9 of ocean zones that cover an expanse equivalent to the width of the United States mainland
10 greater than 3,000 miles. The Insular Areas are highly valued and enjoy a rich history and a
11 bright future.

12
13 The ultimate enforcement in the Act is stated in the Civil Enforcement section, which
14 states that an offending vessel "shall be subject to forfeiture to the United States." 16 U.S.C. §
15 1860 (a).
16

17 The EEZ adjacent to Howland and Baker Islands is well defined, with geographic
18 coordinates published in the Federal Register. The Federal Register states that "to the southeast
19 and south of Howland and Baker Islands the limit of the exclusive economic zone shall be
20 determined by straight lines connecting the following points." Exclusive Economic Zone and
21 Maritime Boundaries, 60 Fed. Reg. 43829 (Aug. 23, 1995). The Federal Register provides a
22 list of 15 geographic coordinates such that the exact EEZ location can be accurately charted by
23
24
25

26
27 ¹ Pacific Island Nations throughout the region proximate to the Pacific Insular Area have parallel statute. In the
28 case of States such as the Republic of the Marshall Islands, the language of the Act's forfeiture section is
substantially adopted into their law verbatim.

1 any vessel either manually or using electronic instruments such as GPS and charting devices

2 Vessels that fish in the U S EEZ without a license are clearly subject to forfeiture

3
4 Congress has explicitly and affirmatively recognized the EEZ off of Howland and Baker
5 Islands See 16 U S C § 1824(c)(8) as amended by Magnuson Stevens Fishery Conservation
6 and Management Reauthorization Act of 2006 section 6 Pub L 109 479 (2007) The
7 Magnuson Act provides in part

8
9 In the case of violations by foreign vessels occurring within **the exclusive economic**
10 **zones off** Midway Atoll Johnston Atoll Kingman Reef Palmyra Atoll Jarvis **Howland,**
11 **Baker** and Wake Islands amounts received by the Secretary attributable to fines and penalties

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13
14 The seaward limit of the exclusive economic zone is a line 200 nautical miles from the baseline from which the
15 territorial sea is measured except to the southeast and south of Howland and Baker Islands the limit of the exclusive
16 economic zone shall be determined by straight lines connecting the following points

1	0	14 30	N	1 3	08 00	W
	0	14 3	S	173	27 8	W
3	0	43	S	173	4 30	W
4	1	04 06	S	174	1 41	W
	1	1 30	S	1 4	31 02	W
6	1	14 57	S	174	34 48	W
	1	36	S	1	34 1	W
8	1	59 17	S	1 5	45 0	W
		1 09	S	1 6	1 8	W
10	2	3 51	S	1 6	38 50	W
11		40 6	S	176	51 13	W
1		44 40	S	1 7	8 01	W
1		44 3	S	1 6	8 08	W
14		6 33	S	1 7	1 43	W
1		8 4	S	1	6 00	W

1 imposed under this Act shall be deposited into a named fund Id (Emphasis added)

2 Accordingly not only has the Executive Branch published the limits of the U S EEZ off
3 of Howland and Baker in the Federal Register but the United States Congress has endorsed the
4 EEZ off of those islands

5
6 In short the United States duly established its Exclusive Economic Zone in the area
7 around Howland and Baker Islands pursuant to U S statute Congress has explicitly
8 acknowledged the EEZ around Howland and Baker Islands Marshalls 201 was fishing in this
9 U S EEZ without a license on September 9 2006 The U S Coast Guard observed and
10 intercepted Marshalls 201 Therefore Marshalls 201 violated United States law and the vessel
11 is subject to forfeiture This case is as simple as that This Court should reject Defendant s
12 reckless arguments that attempt to undermine U S law and escape responsibility for it s
13 violations
14
15

16 **III DEFENDANT HAS NO STANDING TO DISPUTE THE EEZ OF THE**
17 **UNITED STATES**

18 Defendant has no standing to assert that the United States established its EEZ in
19 contravention of international law Rights under international law including the law of the sea
20 accrue to sovereign nations Allegations of inconsistency with international law are matters of
21 international affairs not judicial redress Neither the United Nations Law of the Sea Convention
22 (UNCLOS) nor international law in general is invocable by the Defendant in this case United
23 States v Jimenez Nava 243 F 3d 192 195 (5th Cir 2001) United States v Postal 589 F 2d
24 862 878 (5th Cir 1979) Accordingly courts have precluded defendants in enforcement
25 proceedings from invoking treaty based defenses United States v Li 206 F 3d 56 60 61 (1st Cir
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1 2000) (en banc) United States v. Minn 829 F.2d 849, 852 (9th Cir. 1987). The rule applies
2 even more strongly where the person asserting the treaty-based right is seeking dismissal. Li
3
4 206 F.3d at 61.

5 The question of whether the United States has properly established its Exclusive
6 Economic Zone under international law, the status of boundaries between the United States and
7 its neighboring countries, and what interpretation and the United States should give to an
8 unratified treaty, etc. — are matters that fall within the prerogative of the Executive Branch.
9
10 Baker v. Carr, 369 U.S. 186, 211-12 (1962); Chicago & Southern Airlines Inc. v. Waterman
11 Steamship Corp., 333 U.S. 103, 111 (1948) (the very nature of executive decisions as to foreign
12 policy is political, not judicial); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)
13 (conduct of foreign relations is committed by the Constitution to the executive and legislative
14 departments); Eveland v. Director of CIA, 843 F.2d 46, 49 (1st Cir. 1988) (foreign policy
15 concerns are not justiciable and wholly confided by our Constitution to the political departments
16 of the government, Executive and Legislative); United States v. Peterson, 812 F.2d 486, 492
17 (9th Cir. 1987) (the ramifications of any violation of international law in a search conducted of
18 defendant's ship were largely political). As the Supreme Court has often noted, the Executive
19 Branch's interpretation of a treaty is entitled to great deference. Sumitomo Shoji America, Inc.
20 v. Avagliano, 457 U.S. 176, 184-185 (1982) (Although not conclusive, the meaning attributed
21 to treaty provisions by the Government agencies charged with their negotiation and enforcement
22 is entitled to great weight). Restatement (Third) of the Foreign Relations Law of the United
23 States § 326 (1987); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); United States v. Kin Hong
24 110 F.3d 103 (1st Cir. 1997) ([T]he executive branch's construction of a treaty, although not
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1 binding upon the courts is entitled to great weight.) In re Extradition of Howard, 996 F.2d
2 1520, 1530 n.6 (1st Cir. 1993) (deference to executive in extradition context stems, at least in
3 part, from fact that executive wrote and negotiated operative documents). DuPre v. United
4 States, 559 F.2d 1151, 1155 (9th Cir. 1977).

6 Further, the United States is not yet a party to the UNCLOS. As such, UNCLOS is not a
7 treaty under United States law and is, therefore, by definition, not a self-executing treaty. Even
8 if the United States were a party to the Law of the Sea Convention, it would not be invocable by
9 the Defendant. As reflected in the report of the Senate Foreign Relations Committee, the
10 Convention (with certain exceptions not applicable here) would not be self-executing and, in the
11 view of both the Committee and the Executive Branch, the Convention would not create private
12 rights of action or other enforceable individual legal rights in U.S. courts. Convention on the
13 Law of the Sea, S. Exec. Rep. No. 110-9 at 18-23 (110th Cong., 1st Sess. 2007).

16 The treaty would have to be self-executing. United States v. Postal, 589 F.2d at 876, and
17 contain explicit language creating a private right of action or other judicially enforceable right
18 for it to be invocable by a Defendant. Defendant has no standing to invoke UNCLOS in defense
19 of the violation.

21 **IV THE U.S. EEZ CONFORMS TO INTERNATIONAL LAW**

22 Even assuming, for the sake of argument, that Defendant has standing to invoke
23 international law, the Defendant completely mischaracterizes international law. It is simply
24 incorrect to assert that Howland and Baker Islands may not generate an EEZ.

26 Defendant bases its argument on Article 121(3) of UNCLOS. The full article provides
27 that
28

1 *1. An island is a naturally formed area of land surrounded by water which is above*
2 *water at high tide.*

3 *2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the*
4 *exclusive economic zone and the continental shelf of an island are determined in*
5 *accordance with the provisions of the present Convention applicable to land*
6 *territory.*

7 *3. Rocks which cannot sustain human habitation or economic life of their own shall*
8 *have no exclusive economic zone or continental shelf. (Emphasis added)*

9 Defendant concludes that Howland and Baker are rocks as that term is used in
10 paragraph 3 of article 121. For several reasons Defendant's radical reading of Article 121(3) is
11 wrong, not least because his reading conflicts with the plain meaning of the words of Article 121.
12 First, the Defendant and its expert Professor Van Dyke think that if there is no present human
13 habitation on an island then it cannot sustain human habitation and is thus a rock under Article
14 121(3). Van Dyke Deposition 71, 74, 77, 78, 84, 116, 120 (Attachment D). The Defendant and
15 Professor Van Dyke take the view that even if there had been habitation on an island in the past
16 if there is no habitation on the island today then it is necessarily a rock. Id. In the professional
17 opinion of J. Ashley Roach, the State Department's expert on law of the sea, this is not a correct
18 interpretation of Article 121(3) and is contrary to the plain language of Article 121(3).
19 Declaration of Mr. Roach at page 2 (Attachment A). Article 121(3) uses the formulation "cannot
20 sustain human habitation" not "do not support human habitation." The question posed by
21 Article 121(3) is whether the feature at issue is habitable. Robert Smith, who as the nation's
22 former chief maritime geographer has had direct experience with State's establishing EEZs
23 adjacent to presently uninhabited islands (including those of Kiribati and many other Pacific
24 Island nation States) agrees with the present Department of State position as expressed by Mr.
25 Roach (Attachment B & C). Contrary to the Defendant's view, there is no requirement that the
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1 feature actually be inhabited. A review of the history of Howland and Baker shows that both
2 islands have had periods of habitation in the relatively recent past and they have played a role in
3 various economic ventures. Van Dyke Deposition 107-120 and Exhibits 8-15 (Attachment D).
4 Further, there is no evidence in the record that they will be uninhabited in the future or have no
5 economic life. Significantly, the Department of State does not view either island as a rock under
6 Article 121(3). In sum, Defendant's reading of Article 121(3) conflicts with the plain meaning of
7 that provision and the considered judgment of the U.S. Department of State.
8
9

10 Second, the Defendant and Professor Van Dyke rely heavily on what they assert is State
11 practice, showing that Howland and Baker are rocks under Article 121(3). Professor Van Dyke
12 incorrectly portrays the facts and the concept of State practice. As noted by Mr. Roach, State
13 practice refers to the subsequent practice in the application of a treaty text which establishes the
14 agreement of the parties regarding its application. It refers to the way a text is actually applied by
15 the parties. If the practice is consistent and is common to, or accepted by, the parties, the
16 subsequent practice is usually a good indication of what the parties understand the text to mean.
17 Anthony Aust, *Modern Treaty Law and Practice* 194 (Cambridge University Press, 2000).
18 Professor Van Dyke cites several cases involving disputes between countries as to whether a
19 particular feature is a rock under Article 121(3). Van Dyke Declaration (Attachment E). Van
20 Dyke Deposition 35-36, 51-54 (Attachment D), citing Senkaku/Diaoyu Dao dispute,
21 Okinotorishima dispute, Dokdo/Takeshima dispute, Spratly Islands dispute. The very fact that
22 the proper characterization of these features is disputed completely undercuts Professor Van
23 Dyke's assertion that state practice shows that these features are "rocks" under Article 121(3). It
24 is entirely inappropriate to rely on disputed features as examples of state practice, for in each case
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1 there is a state taking exactly the opposite position. The one unambiguous example of State
2 practice cited by Professor Van Dyke (Declaration Attachment E Deposition 29-34 75-76
3 Attachment D) the U.K.'s determination that Rockall is a rock and not an island, if anything
4 supports the U.S. view that Howland and Baker are not rocks. Rockall is a tiny, sheer-walled
5 uninhabitable feature, a fraction of the size of Howland and Baker. Van Dyke Deposition 184
6 and Exhibits 2-5, 25 (Attachment D) Smith Deposition 102-104 (Attachment F). Thus
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8 Defendants misleadingly mischaracterizes and distorts State practice in support of its view
9
10 which is in fact unsupportable.

11 Third, as Mr. Roach attests, State practice supports the U.S. view that Howland and
12 Baker are not rocks under Article 121(3). There are many examples of relatively small
13 uninhabited features around or from which countries have established Exclusive Economic
14 Zones. Of direct relevance to this case, Kiribati has claimed its EEZ measured in part from
15 McKean Island, a feature quite similar to Baker Island. Edmonds Deposition 14-15 and Exhibits
16 1-2 and 8 (Attachment G).

17 http://www.pacificislandtravel.com/kiribati/about_destin_mckean.html

18
19 Other examples include France, which in the Pacific and Indian Oceans, has established
20 EEZs around islands in French Polynesia, French Southern Ocean islands (Kerguelen Islands),
21 Australia around Heard Island, islands of the Mozambique Channel, and Clipperton Island, Fiji,
22 which has established an EEZ around Ceva-i-Ra (Thjewa-i-Ra), Mexico, which has established
23 an EEZ around Clarion and Roca Portida islets in the Pacific, and Venezuela, which has
24 established an EEZ around Aves Island. (Van Dyke Deposition 25-39 Attachment D Smith
25 Deposition 100 Attachment F). The United States gave full effect to Aves Islands in the
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1 Maritime Boundary Treaty between the United States and Venezuela of March 28, 1978, 2
2 U.S.T. 3100. In doing so, the United States recognized Venezuela's right to claim an EEZ from
3
4 Aves Island. The United States has established an EEZ around Muro Reef in the Northwest
5 Hawaiian Islands, Palmyra Atoll, Kingman Reef and around Howland and Baker. (Exclusive
6 Economic Zone and Maritime Boundaries, 60 Fed. Reg. 43825-43828-43829 (Aug. 23, 1995),
7 Department of Defense Maritime Claims Reference Manual, page 664 and Table C1 T286,
8 http://www.dtic.mil/whs/directives/corres/2005/jm_062305/United_States_America.doc, Van
9 Dyke deposition 45 (Attachment D).
10

11 Professor Van Dyke admits in his deposition, pages 121, 122, 126 (Attachment D), that
12 among Pacific Island nations there will be winners and losers under his interpretation of
13 Article 121(3), necessarily suggesting that they have established EEZs around uninhabited
14 islands that he would consider rocks. The admission that several Pacific Island nations have
15 established EEZs off of features that he would consider rocks undercuts his position that state
16 practice supports his view. Thus, contrary to Defendant's radical view that the United States
17 acted inconsistently with international law, it is Defendant that is out of step with the world
18 community. Robert Smith, who was the nation's chief maritime geographer in the Department of
19 State throughout the time that UNCLOS was being formulated, also has stated that Howland and
20 Baker are not rocks under the definition of Article 121(3) (Attachments C & F). It is worth
21 mentioning that if Professor Van Dyke's view prevails – contrary to the meaning of Article
22 121(3) and despite State practice to the contrary – Pacific Island nations stand to lose tens of
23 thousands of square miles of their EEZs.
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1 Fourth Professor Van Dyke relies on maritime delimitation cases to support his view that
2 Howland and Baker are rocks (Declaration Attachment E) As noted by Mr Roach none of
3 these cases specifically addressed Article 121(3) Rather they were cases under Article 74 of the
4 Law of the Sea Convention in entirely different body of law applying entirely different legal
5 questions from those that have been raised in this case Professor Van Dyke stated in his
6 declaration page 5 paragraph (d) that the decisions made by both Nicaragua and Honduras that
7 five small cays east of their coasts (Bobel Cay Savanna Cay Port Royal Cay South Cay and
8 Edinburgh Cay) should generate only 12 nautical mile territorial seas and should not generate
9 EEZs The judgment of the International Court of Justice in this case Case Concerning
10 Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea
11 October 8 2007 [http://www.icj-](http://www.icj.org/docket/files/120/14075.pdf?PHPSESSID=be185f20d250a4ace1f4068d9ad9963c)
12 [org/docket/files/120/14075.pdf?PHPSESSID=be185f20d250a4ace1f4068d9ad9963c](http://www.icj.org/docket/files/120/14075.pdf?PHPSESSID=be185f20d250a4ace1f4068d9ad9963c) at
13 paragraph 137 on page 40 states that these features fall within the definition and regime of
14 islands under Article 121 and notes that the Parties do not claim for these islands any maritime
15 areas beyond the territorial sea (This point is repeated in paragraph 262 on page 72 of the
16 Court's judgment) However in paragraph 303 on page 83 the Court observes that

21
22 As a 12 mile breadth of territorial sea has been accorded to these islands it becomes
23 apparent that the territorial sea attributed to the islands of Bobel Cay Savanna Cay
24 Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua) would
25 lead to an overlap in the territorial sea of Nicaragua and Honduras in this area both
26 to the south and to the north of the 15th parallel
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1 Where the territorial seas from these islands overlap, there can be no EEZ measured from these
2 islands. Accordingly, it is incorrect to state that Nicaragua and Honduras decided that these
3 islands should not generate EEZs. In short, Defendant mischaracterizes international tribunal
4 decisions in an attempt to convey a false impression of the state of the law. This Court should
5 not fall for Defendant's sleight of hand.

6
7 Fifth, Professor Van Dyke relies heavily on a separate opinion of Judge Budislav Vukas
8 of the International Tribunal for the Law of the Sea (The Volga Case (Russian Federation v
9 Australia) Case No. 11 Prompt Release Judgment Declaration of Judge Vukas ITLOS Reports
10 2002/42 International Legal Materials 178-181 (2003) http://www.itlos.org/start2_en.html (then
11 follow Proceedings and Judgement hyperlink to List of Cases hyperlink to case no. 11))
12 (Van Dyke Declaration Attachment E Van Dyke Deposition 23-26 Attachment D) Professor
13 Van Dyke did not mention that no other judge on the 21-judge Tribunal agreed with Judge
14 Vukas' view on the rock issue, which was not raised by Russia. The judgment of the Tribunal
15 and the other three separate opinions each accept that Heard Island and the McDonald Islands
16 generated an EEZ. In an earlier case before the Tribunal, Judge Vukas questioned whether the
17 establishment of an EEZ off the shores of the uninhabitable and uninhabited Kerguelen Islands
18 was in accordance with the Convention. The Tribunal's judgment and the six separate opinions
19 each did not question the validity of the EEZ around those islands (The Monte Confurco Case
20 (Seychelles v. France) Case No. 6 Prompt Release Judgment Declaration of Judge Vukas
21 http://www.itlos.org/start2_en.html (case no. 6)) Both of these cases involved prompt release of
22 fishing vessels arrested for violation of the EEZ regulations of Australia and France, respectively.
23 As Mr. Roach observes, most of the members of the Tribunal that heard both cases were like
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1 Judge Vukas' government delegates to the Third UN Conference on the Law of the Sea. Again
2 in an attempt to portray its position as within the mainstream. Defendant neglects to inform this
3
4 Court that it is relying on an isolated position.

5 It is entirely incorrect to conclude that Howland and Baker Islands are "rocks" under Article
6 121(3). It is noteworthy that no State has ever raised such an argument with regard to these
7 islands, which share characteristics with many of the islands throughout the Pacific. Indeed,
8 neighboring Kiribati has not challenged the establishment by the United States of its EEZ off of
9 Baker and Howland Islands. Smith Expert Rebuttal Report pages 1-4 (Attachment B). Kiribati
10 has agreed that the vessel was not fishing in the Kiribati EEZ at the time alleged in the complaint
11 (Van Dyke Deposition Exhibit 7, Attachment 1, the same telegram from the U.S. Embassy in
12 Suva, prepared in the course of the Embassy's diplomatic mission to the Department of State
13 retrieved by the custodian of the telegram). Roach Declaration at page 4g (Attachment A). In
14 sum, the one State that has the most direct interest in whether the United States has properly
15 established an EEZ off of Howland and Baker Islands has not protested the validity of that U.S.
16 EEZ. This Court should not lose sight of the significance of this fact. Defendant claims that it
17 was in the waters of Kiribati, postures that it is standing for the rights of Kiribati, and implies
18 that Kiribati would endorse the defense. The fact that Kiribati did not do so illustrates the fallacy
19 of Defendant's argument.


20
21 Finally, the Court should consider the implications of Defendant's argument that an
22 uninhabited island necessarily is a rock under Article 121(3). Under Defendant's reasoning, a
23 country would lose jurisdiction if it decided, as the United States has done, to make outlying
24 islands a nature preserve and not to develop the land for residential, industrial or commercial use.

1 This would not only be bad policy but could not have been the intent of the drafters of Article
2 121(s) for many of the other provisions of the Convention are specifically designed to protect
3 and preserve the marine environment. For this and all of the above reasons, the Court should
4 reject Defendant's erroneous and misguided attempt to deprive the United States of its legitimate
5 maritime jurisdiction.

6 7 V CONCLUSION

8
9 Defendant's legal arguments are without merit and serve only to demonstrate a deceptive
10 and inadequate effort on the part of the Defendant to further evade the laws of the United States.
11 Those laws are designed to protect and manage its Pacific Ocean resources. Defendant has
12 chosen not to comply with those laws and once caught has presented sweeping and outlandish
13 arguments to escape the consequences of its illegal actions. Defendant further demonstrates a
14 disregard for the law and international relations and norms. Defendant's baseless Motion should
15 be denied.

16
17
18 LEONARDO M. RAPADAS
19 United States Attorney
20 Districts of Guam and NMI

21 
22 MIKAEL W. SCHWAB
23 Assistant U.S. Attorney

24 Paul Ortiz
25 Senior Attorney
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DECLARATION OF J ASHLEY ROACH

1 My name is J Ashley Roach. I am currently an attorney adviser in the Office of the Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs, U.S. Department of State, where I have served since October 1988. I hold a Masters Degree in Public International Law and Comparative Law with highest honors from George Washington University Law School. I am also a retired Captain in the Judge Advocate General's Corps of the United States Navy. I have written extensively on matters related to the law of the sea, including (with Robert W. Smith) the book *United States Responses to Excessive Maritime Claims*, second edition published by Martinus Nijhoff in 1996.

2 The Office of the Legal Adviser, among other duties, provides legal advice and opinions to the Department of State and other government agencies on the law of the sea, including the interpretation and application of relevant treaties and customary international law.

3 Among my responsibilities in the Office of Legal Adviser has been to provide legal advice on the United Nations Convention on the Law of the Sea, as well as interpretation of that Convention and international oceans law. I have assisted in the drafting of the official United States interpretations of the Convention.

4 I am familiar with the various arguments raised by the defendant in this case and have read the Defendant's Motion to Dismiss for Lack of Subject Matter and In Rem Jurisdiction, the Memorandum of Points and Authorities in Support thereof, the undated Expert Report and Declaration dated October 26, 2007 of Professor Jon Van Dyke, the Declaration dated October 25, 2007 and Expert Report dated August 24, 2007 of Scott B. Edmonds, and the depositions of Professor Van Dyke taken on October 31, 2007 and Mr. Edmonds taken on November 1, 2007. I have also read the August 2007 report, the Expert Rebuttal Report dated September 24, 2007 and the deposition taken November 2, 2007 of Dr. Robert W. Smith.

5 Pursuant to the decision of President Reagan announced on July 9, 1982 (II Public Papers of the Presidents: Ronald Reagan, 1982 (1983) pages 911-912), the United States did not sign the United Nations Convention on the Law of the Sea (Law of the Sea Convention) during the period it was open for signature, i.e., from 10 December 1982 until 9 December 1984 (see article 305(2)). Although the Law of the Sea Convention (along with the 1994 Agreement Relating to the Implementation of Part XI of the Convention) was submitted to the United States Senate for its advice and consent on October 7, 1994 (Senate Treaty Document 103-39, <http://lugar.senate.gov/sfrc/pdf/presidentialmessage.pdf>), the Senate has not yet given advice and consent, and the United States has not become a Party to the Convention. As such, the Convention is not a treaty for purposes of U.S. domestic law. Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, page 5, lines 5-7, and page 16, line 10, incorrectly state that the United States has signed the Convention.

6 As a threshold matter, it is my legal opinion that the Law of the Sea Convention is not invocable by the defendants in this case. With regard to the Law of the Sea Convention, the United States is not a Party. As such, the Convention is not a 'treaty' under United States law.

and is therefore by definition, not a self-executing treaty. Even if the United States were a Party to the Law of the Sea Convention, it would not be invocable by a defendant in a forfeiture case. As reflected in the December 19, 2007 report of the Senate Foreign Relations Committee, the Convention (with certain exceptions not applicable here) would not be self-executing and, in the view of both the Committee and the Executive Branch, the Convention would not “create private rights of action or other enforceable individual legal rights in U.S. courts.” Convention on the Law of the Sea, S. Exec. Rep. No. 110-9, at 18 and 23 (110th Cong. 1st Sess. 2007). This is the most recent and official Executive Branch interpretation of the Convention. (See also United Nations Convention on the Law of the Sea, S. Exec. Rep. No. 108-10 at 15 and 20 (108th Cong. 2nd Sess. 2004). <http://lugar.senate.gov/sfrc/pdf/seareport.pdf>.)

7 The Defendant and its experts assert that Howland and Baker Islands are “rocks” within the definition of article 121(3) of the Law of the Sea Convention (article 121(3)), and thus that the United States may not establish an Exclusive Economic Zone around them. It is my legal opinion that the Defendant and its experts are mistaken.

a. Article 121(3) provides: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” It is clear, based on my review of the materials in this case, that the Defendant and Professor Van Dyke think that if there is no present human habitation on an island, then it cannot sustain human habitation and is thus a rock under article 121(3). See, e.g., Van Dyke Deposition 71-74, 77-78, 84, 116-120. The Defendant and Professor Van Dyke take the view that even if there had been habitation on an island in the past, if there is no habitation on the island today, then it is necessarily a rock. *Id.* In my opinion, this is not a correct interpretation of article 121(3) and is contrary to the plain language of article 121(3). Article 121(3) uses the formulation “cannot sustain human habitation, not ‘do not support human habitation.’” The question posed by article 121(3) is whether the feature at issue is habitable. Contrary to the Defendant’s view, there is no requirement that the feature actually be inhabited. A review of the history of Howland and Baker shows that both islands have been inhabited in the relatively recent past. Van Dyke Deposition 107-120 and Exhibits 8-15. Further, there is no evidence in the record that they will be uninhabited in the future. Accordingly, the Department of State does not view either island as a rock under article 121(3).

b. The Defendant and Professor Van Dyke rely heavily on what they assert is state practice, showing that Howland and Baker are rocks under article 121(3). Professor Van Dyke incorrectly portrays the facts and the concept of state practice. State practice refers to the subsequent practice in the application of a treaty text which establishes the agreement of the parties regarding its application. It refers to the way a text is actually applied by the parties. If the practice is consistent and is common to, or accepted by, the parties, the subsequent practice is usually a good indication of what the parties understand the text to mean. Anthony Aust, *Modern Treaty Law and Practice* 194 (Cambridge University Press 2000). Professor Van Dyke cites several cases involving disputes between countries as to whether a particular feature is a rock under article 121(3). Van Dyke Declaration 15-19; Van Dyke Deposition 35-36, 51-54, citing Senkaku/Diaoyu Dao dispute, Okinotorishima dispute, Dokdo/Takeshima dispute, Spratly Islands dispute. The very fact that the proper characterization of these features is disputed

completely undercuts Professor Van Dyke's assertion that state practice shows that these features are 'rocks' under article 121(3). It is entirely inappropriate to rely on disputed features as examples of state practice for in each case there is a state taking exactly the opposite position. The one unambiguous example of state practice cited by Professor Van Dyke (Declaration 14-15, Deposition 29-34, 75-76), the UK's determination that Rockall is a rock and not an island, if anything supports the U.S. view that Howland and Baker are not rocks. Rockall is a tiny, sheer walled uninhabitable feature, a fraction of the size of Howland and Baker. Van Dyke Deposition 184 and Exhibits 2-5-25. Smith Deposition 102-104.

c. State practice supports the U.S. view that Howland and Baker are not rocks under article 121(3). There are many examples of relatively small uninhabited features around or from which countries have established Exclusive Economic Zones. Of direct relevance to this case, Kiribati has claimed its EEZ measured in part from McKean Island, a feature quite similar to Baker Island. Edmonds Deposition 14-15 and Exhibits 1-2 and 8. http://www.pacificislandtravel.com/Kiribati/about_destin/mckean.html. Other examples include France, which in the Pacific and Indian Oceans has established EEZs around islands in French Polynesia, French Southern Ocean islands (Kerguelen Islands), Australia around Heard Island, islands of the Mozambique Channel, and Chipperton Island. Fiji has established an EEZ around Ceva-i-Ra (Thjeva-i-Ra). Mexico has established an EEZ around Clarion and Roca Portida islets in the Pacific. Venezuela established an EEZ around Aves Island (Van Dyke Deposition 23-39, Smith Deposition 100). The United States gave full effect to Aves Islands in the Maritime Boundary Treaty between the United States and Venezuela of March 28, 1978, 23 U.S.T. 3100, in doing so, the United States recognized Venezuela's right to claim an EEZ from Aves Island. The United States has established an EEZ around Maro Reef in the Northwest Hawaiian Islands, Palmyra Atoll, Kingman Reef and around Howland and Baker. (60 Fed. Reg. 43825-43828, 43829, Aug. 23, 1995, Department of Defense Maritime Claims Reference Manual, page 664 and Table C1-T286. http://www.dtic.mil/whs/directives/corres/20051m_062305/United_States_America.doc. Van Dyke deposition 45). Professor Van Dyke admits in his deposition, pages 121-122, 126, that among Pacific Island nations there will be winners and losers under his interpretation of article 121(3), necessarily suggesting that they have established EEZs around uninhabited islands that he would consider 'rocks'. The admission that several Pacific Island nations have established EEZs off of features that he would consider "rocks" undercuts his position that state practice supports his view.

d. Professor Van Dyke relies on maritime delimitation cases to support his view that Howland and Baker are rocks. (Declaration 19-20). None of these cases specifically addressed article 121(3). Rather, they were cases under article 74 of the Law of the Sea Convention, an entirely different body of law applying entirely different legal questions from those that have been raised in this case. Professor Van Dyke stated in his declaration, page 5, paragraph (d), that "the decisions made by both Nicaragua and Honduras that five small cays east of their coasts (Bobel Cay, Savanna Cay, Port Royal Cay, South Cay, and Edinburgh Cay) should generate only 12 nautical mile territorial seas and should not generate EEZs (emphasis added). The judgment of the International Court of Justice in this case, *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, October 8, 2007.

<http://www.icj-cij.org/docket/files/120/14075.pdf?PHPSESSID=be185f20d250a4ace1f4068d9ad9963c>, at paragraph 137 on page 40, states that these features “fall within the definition and regime of islands under Article 121 and “notes that the Parties do not claim for these islands any maritime areas beyond the territorial sea” (This point is repeated in paragraph 262 on page 72 of the Court’s judgment) However, in paragraph 303 on page 83 the Court observes that

“As a 12-mile breadth of territorial sea has been accorded to these islands it becomes apparent that the territorial sea attributed to the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua) would lead to an overlap in the territorial sea of Nicaragua and Honduras in this area, both to the south and to the north of the 15th parallel

Where the territorial seas from these islands overlap there can be no EEZ measured from these islands Accordingly it is incorrect to state that Nicaragua and Honduras decided that these islands should not generate EEZs

e Professor Van Dyke relies heavily on a separate opinion of Judge Budislav Vukas of the International Tribunal for the Law of the Sea (The *Volga* Case (Russian Federation v Australia) Case No 11, Prompt Release, Judgment Declaration of Judge Vukas ITLOS Reports 2002, 42 International Legal Materials 178 181 (2003) http://www.itlos.org/start2_en.html (case no 11)) (Van Dyke Declaration 5-6 Van Dyke Deposition 23-26) Professor Van Dyke did not mention that no other judge on the 21 judge Tribunal agreed with Judge Vukas view on the rock issue, which was not raised by Russia The judgment of the Tribunal and the other three separate opinions each accept that Heard Island and the McDonald Islands generated an EEZ In an earlier case before the Tribunal Judge Vukas questioned whether the establishment of an EEZ off the shores of the uninhabitable and uninhabited Kerguelen Islands was in accordance with the Convention The Tribunal’s judgment and the six separate opinions each did not question the validity of the EEZ around those islands (The *Monte Confurco* Case (Seychelles v France), Case No 6 Prompt Release Judgment, Declaration of Judge Vukas http://www.itlos.org/start2_en.html (case no 6)) Both of these cases involved prompt release of fishing vessels arrested for violation of the EEZ regulations of Australia and France respectively Most of the members of the Tribunal that heard both cases were like Judge Vukas government delegates to the Third UN Conference on the Law of the Sea

f The definition of a nation’s boundaries including its EEZ is a uniquely sovereign determination This determination is not subject to challenge by a defendant in a forfeiture case Only another sovereign may challenge such an establishment of an EEZ

g Not only has Kiribati has not challenged the establishment by the United States of its EEZ off of Baker and Howland Islands but it has agreed in such establishment Smith Expert Rebuttal Report page 3 paragraph 10 Kiribati has agreed that the vessel was not fishing in the Kiribati EEZ at the time alleged in the complaint (Van Dyke Deposition Exhibit 7 Attachment 1 the same telegram from the U S Embassy in Suva prepared in the course of the Embassy’s diplomatic mission, to the Department of State retrieved by the custodian of the telegram)

h The Defendant and its experts assert that their interpretation of article 121(3) reflects customary international law The United States has not said that their interpretation of article 121(3) is customary international law It is a sovereign decision, not a decision of a defendant in a forfeiture case as to whether a particular provision of the Law of the Sea Convention reflects customary international law Whether article 121(3) is customary international law is beside the point since the Defendant s interpretation of article 121(3) is clearly not customary international law It conflicts with the plain language of the Convention, the practice of other nations and the Executive Branch s declaration of its EEZ which was previously announced in the Federal Register (60 Fed Reg 43825 43828 43829, Aug 23 1995 *reprinted in* Department of Defense Maritime Claims Reference Manual page 664 and Table C1 T286, http://www.dtic.mil/whs/directives/corres/20051m_062305/United_States_America.doc)

I hereby declare under penalty of perjury that the foregoing is true and correct

Executed this 20th day of December 2007 Washington, D C


J ASHLEY ROACH

Attachment as stated

Roach, J Ashley

From Sheils Megan G
Sent Tuesday December 11 2007 5 07 PM
To Roach J Ashley
Subject UNCLASS requested cable

Attachments messages[13].txt

Hi Ash
Here is the cable you requested Have a good evening!
Megan Sheils MLS
Librarian
A/ISS/Diplomatic Research Service (Pilot)
DiplomaticResearch@state.sgov.gov
SheilsMG@state.sgov.gov
(202) 261 8437

This e-mail is unclassified based on the definitions provided in E.O. 12958

Our mission is to meet the information needs of our customers and the United States Government



messages[13].txt
(7 KB)



United States Department of State

Washington D C 20520

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DEPT OF JUSTICE WASHDC
USDOC WASHDC
AMEMBASSY MAJURO

UNCLAS SUVA 000121

COMMERCE FOR NOAA GCEL/SW-PI

E O 12958 N/A
TAGS EFIS PHSA PBTS KR FQ HQ RM
SUBJECT KIRIBATI F/V MARSHALLS 201 WAS OVER THE LINE

REF REO MURPHY-AUSA SCHWAB TELCONS AND E-MAILS OF 02/21/07 AND PREVIOUS

1 Kiribati Ministry of Foreign Affairs Permanent Secretary Elliot Ali (the highest ranking career official in the ministry) told embassy Suva on February 22 2007 that the government of Kiribati would not/not make a submission in U S court proceedings against the F/V MARSHALLS 201 (Civil Case 06-00030) in support of the defendant's claim to have been fishing in Kiribati's EEZ. Ali's comments came after reviewing the complaint filed with the U S District Court for Guam and after consulting with the Kiribati Ministry of Fisheries and Marine Resources Development (MFMRD)

2 On February 19 2007 MFMRD Vessel Monitoring System (VMS) Officer Ioneba Temoai provided us with an electronic snapshot of F/V MARSHALLS 201's VMS track for the period August 2006-February 2007. This track first records the vessel as being inside Kiribati's (Phoenix Islands) EEZ at 1 28 A M on September 8 2006 having crossed from the U S (Howland and Baker) EEZ and last records it in Kiribati's EEZ at 9 38 P M on September 8 headed back into the U S EEZ. Ioneba's message which we have forwarded to the U S Attorney's office in Guam says that the snapshot indicates that the vessel was not in Kiribati waters during the incident. Foreign

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Affairs All reiterated that position to us

3 Background According to information provided by the U S Attorney s office in Guam (ref), The U S Coast Guard arrested the RMI-flagged F/V MARSHALLS 201 on 9 September 2006 after it was observed fishing within the U S EEZ around Howland and Baker Islands on 7 and 9 September The U S Attorney s office via NOAA and the Department (OES/OMC) asked for post s assistance in determining if the government of Kiribati planned to support the defense assertion that the locations where the F/V MARSHALLS 201 was observed fishing were, in fact within Kiribati s claimed EEZ The bottom line is that it does not and has, in fact reached the opposite conclusion that the vessel was in U S waters as alleged in the complaint
Dinger

NNNN

Attachment B

**REPORT ON THE
MARSHALLS 201 SEPTEMBER 2006
INCIDENT AND ITS RELATIONSHIP
TO THE UNITED STATES 200 NAUTICAL MILE
EXCLUSIVE ECONOMIC ZONE LIMIT**

**DR ROBERT W. SMITH¹
AUGUST 2007**

Summary

1 This paper examines the fishing enforcement boarding and investigation by the United States Coast Guard against the fishing vessel MARSHALLS 201 on 9 September 2006. This report analyzes the location of this enforcement action with regards to the exclusive economic zone limit claimed and published by the United States. The conclusions reached are 1) the limits of the U.S. exclusive economic zone have been published in the official U.S. *Federal Register* and available to the international community and 2) the location where the U.S. Coast Guard reports that the Marshall 201 was fishing illegally is within the U.S. exclusive economic zone.

The Enforcement Action

2 On 9 September 2006 the Marshall 201, a foreign fishing vessel flagged in the Marshall Islands, was detected fishing illegally in U.S. waters by the U.S. Coast Guard (USCGC Walnut). The location of the violation was reported by the Coast Guard at

02-05 667 S, 175 59 531W²

This location is southeast of Baker Island, a U.S. possession in the central Pacific Ocean. The location is more than two nautical miles inside the U.S. exclusive economic limit.³

The United States claim to an Exclusive Economic Zone

3 The United States claim to an exclusive economic zone (EEZ) was made by Presidential Proclamation No. 5030 on March 10, 1983. The outer limit of the EEZ is a line established in such a manner that each point on it is 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.⁴ In areas where the

¹ My resume is attached in the Annex to this Report.
² Summary of ECDIS Data File From 191231Z SEP 2006 to 190130Z SEP 2006, p. 201-647.
³ The calculation was performed in my presence by the Navigator of the USCGC Healy (WMEB 70) 78 August 2007 on a Sperry VMS ECDIS N.
⁴ *Federal Register*, Vol. 60, No. 163, August 23, 1995, at 43925.

United States EEZ overlap the EEZ claims of foreign neighboring States the United States has stated the following:

The Government of the United States of America has been is and will be engaged in consultations and negotiations with governments of neighboring countries concerning the delimitation of areas subject to the respective jurisdiction of the United States and of these countries.

The limits of the exclusive economic zone of the United States as set forth below are intended to be without prejudice to any negotiations with these countries or to any positions which may have been or may be adopted respecting the limits of maritime jurisdiction in such areas.⁵

4 The limit of the United States EEZ seaward of Howland and Baker Islands is described in the 1995 *Federal Register* notice as follows:⁶

The seaward limit of the exclusive economic zone is a line 200 nautical miles from the baseline from which the territorial sea is measured except to the southeast and south of the Howland and Baker Islands the limit of the exclusive economic zone shall be determined by straight lines connecting the following points:

1	0° 14' 30" N	173° 08' 00" W
2	0° 14' 32" S	173° 27' 28" W
3	0° 43' 52" S	173° 45' 30" W
4	1° 04' 06" S	174° 17' 41" W
5	1° 12' 39" S	174° 31' 02" W
6	1° 14' 52" S	174° 34' 48" W
7	1° 52' 36" S	175° 34' 51" W
8	1° 59' 17" S	175° 45' 29" W
9	2° 17' 09" S	176° 13' 58" W
10	2° 32' 51" S	176° 38' 59" W
11	2° 40' 26" S	176° 51' 03" W
12	2° 44' 49" S	176° 58' 01" W
13	2° 44' 53" S	176° 58' 08" W
14	2° 56' 33" S	177° 16' 43" W
15	2° 58' 45" S	177° 26' 00" W

Ibid

Ibid at 43829. Prior to the 1983 EEZ Proclamation, the U.S. had implemented the Magnuson Fishery Conservation and Management Act on March 1977 which claimed an exclusive fishery zone off the 50 U.S. states and off its territories and possessions. The geographic description of the outer limit of the exclusive fishing zone was published in Public Notice 726 *Federal Register* Vol. 42, No. 44, March 7, 1977, 12937-40. The *Federal Register* notice has been updated on several occasions and the most current edition that provides the geographic coordinates defining the outer limit of the United States exclusive economic zone limit is *Federal Register* Vol. 60, No. 163, August 23, 1995, 43825-43829. This notice cites all the earlier *Federal Register* notices. It is the 1995 *Federal Notice* that will be cited in this report.

5 The international community was put on notice by the publishing of the geographical coordinates in the **Federal Register** and it was expected that any users were responsible to know the extent of the United States EEZ off the 50 U.S. states and the territories and possessions of the United States. I understand that U.S. law (title 44 U.S. Code Section 1507) provides that publication of a document such as the US EEZ limits in the **Federal Register** is sufficient to give notice of the contents of the document to a person subject to or affected by it.

6 Any ship navigating in the high seas such as in the area of the U.S. EEZ limit to the southeast of Howland and Baker islands would have a Global Positioning System (GPS) and/or a GPS based plotter on board. At the time of the enforcement action, the MARSHALLS 201 had this equipment available for use by the captain and crew of the vessel. Thus, using the list of geographical coordinates as given in paragraph 4 above, a navigator knows precisely where he was with regards to the United States EEZ limit.

7 This list of 15 points shown in paragraph 4 above is a median line between the United States (Howland and Baker Islands) and Kiribati (which include Gardner Island, McKean Island and Canton Island). A median line is that line which is equally distant along its entire length between the coastlines of the two States. The median line as defined in paragraph 4 above was calculated using the best information available that depicted the coastlines of the United States and Kiribati.

Map of Claimed and Potential Maritime Zones in the Central and South Pacific

8 The map titled "Claimed and Potential Maritime Zones in the Central and South Pacific" as found on the MARSHALL 201 was first made by the author in the late 1980s following the completion of a Pacific regional fisheries negotiations. It is a small scale map with a geographical range from 29 degrees North latitude to 28 degrees South latitude and from 130 degrees West longitude to 135 degrees East longitude. It depicts the Limit of Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, the 200 nautical mile exclusive economic zones, 200 nautical mile fishery jurisdictions, claimed archipelagic waters, negotiated maritime boundaries, potential maritime boundaries (with hypothetical median lines shown), and the United States Exclusive Economic Zone limits. There is a legend that lists the negotiated maritime boundaries with the date of signature and the date the treaty entered into force, if applicable. There is also a listing for those States claiming Exclusive Economic Zones and those claiming an Exclusive Fishing Zone.

9 This map of claimed and potential maritime zones in the central and south Pacific has been updated three times, with the 3rd revision dated July 2001. The primary reason for the updates was to show more agreed maritime boundaries. The intent of the map was, first and foremost, to provide United States government officials an illustrative map of the region and to show the extent of the newly agreed upon Pacific fishery treaty. It has also been used by U.S. government officials to gain a general understanding of

where U.S. maritime jurisdiction is exercised in this region. While the scale of the map does not allow precise plotting of positions, one purpose of the map was to show the general areas of all claimed EEZs and fishery zones in the Pacific. Actual boundaries take on no dimension.⁴

10. This map was produced by the State Department. However, the official claim by the United States to an exclusive economic zone is the list of geographic coordinates published in the *Federal Register*. This map has never been sold as a commercial product or intended to be used for navigational purposes. It was produced for illustrative purposes only. Over the years, copies of this illustrative map were requested by non-U.S. entities and printing of additional copies accompanied map revisions. It is believed that the map likely was distributed at certain international meetings, such as at the annual meeting of the Pacific fisheries treaty to illustrate EEZ areas within the fishery treaty area. The extent of the distribution of this map is unknown to the author.

Kiribati EEZ Claim

11. The Government of Kiribati claimed a 200 nautical mile exclusive economic zone in its Maritime Zones (Declaration) Act 1983 No. 7 of 16 May 1983. In areas where the Kiribati EEZ overlaps that of its neighboring foreign States its EEZ claim extends to the median line. Specifically, its 1983 law states in Article 7(5)

Where the median line is less than 200 nautical miles from the line which the breadth of the territorial sea is to be measured, the outer limits of the exclusive economic zone extend to the median line.

12. During my career at the State Department, from 1975 to March 2006, I was not aware of any diplomatic correspondence from the Government of Kiribati complaining about the median line that the United States established for the limits of its exclusive economic zone in the areas adjacent to Kiribati.

⁴ A. Pratte or Brownlie correctly point out in his treatise on African boundaries: "a boundary has no breadth." Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopedia*, C. Hurst and Company, London, 1979, pg. 3.

Dr Robert W Smith
August 2007

Compensation

- 1 Study review reports and report generations \$240 hour
- 2 Testimony
 - a Depositions \$240 hour
 - b Trial \$ 1 080 half day
 - c Trial \$ 2 160 full day

Annex

Curriculum Vitae of

DR ROBERT W SMITH

PROFESSIONAL EXPERIENCE

CURRENT GEOGRAPHIC CONSULTANT AND ADVISOR

Advise on all aspects of ocean policies and planning including developing strategies for exploring and exploiting offshore resources in an environmentally sound manner. Provide geographical and technical expertise for maritime boundary delimitation and arbitration, offshore jurisdictional claims, sovereignty disputes, and the development of offshore energy resources. Write position papers to support policy decisions on the rational development and management of marine resources. Provide technical and geographical expert testimony in domestic and international courts. Clients include the Government of Guyana, British Gas, Thailand, ExxonMobil, International Mapping Associates, the U.S. Department of Justice, and several international law firms.

1975-2006 GEOGRAPHER U.S. DEPARTMENT OF STATE

As the U.S. government expert on maritime boundary and jurisdictional issues, I assisted in the development and implementation of U.S. ocean policy. I was responsible for the technical and geographical aspects of negotiating U.S. bilateral maritime boundaries and establishing U.S. claims to marine jurisdiction. In this role, I coordinated the U.S. effort to develop technically accurate and precise boundaries and outer limits for the territorial sea, contiguous zone, exclusive economic zone, and the continental shelf. For the establishment of U.S. maritime limits, I assured that all U.S. claims were in accordance with the international law of the sea principles using modern charting techniques. I represented the U.S. Government at international meetings and conferences, including United Nations meetings, on subjects of my expertise.

My State Department career was spent in two offices: in the Office of The Geographer (1975-87) where I served as the Chief of the International Boundary and Resource Division where I managed several geographic analysts and then I became the Special Assistant of Ocean Affairs and Policy Planning. From 1987 to March 2006 I was the geographer for the Office of Oceans Affairs. Throughout my State Department career I oversaw and was the principle author of the State Department's *Limits in the Seas* studies in which analyses are given on the state practice of maritime claims and boundaries. Other related experience during my State Department career included:

United States Representative to

- United Nations 13th States Parties Meeting for the Law of the Sea Convention, 2003
- Caribbean Maritime Boundary Conference (Mexico City), 2003
- United Nations Conference on Maritime Boundary Delimitation, 1999
- United Nations Conference on the Continental Shelf, 1993 and 1995
- United Nations Conference on the Maritime Baseline, 1987
- International Hydrographic Organization Law of the Sea Group of Technical Experts, 1985

United States Department of State Representative to Department of the Interior's Outer Continental Shelf Advisory Committee 2002-2006

Member National Security Council Interagency Committee on the U.S. Baseline 1975-2006

United States Delegations

Head of Delegation Major Maritime Powers Meeting 1998 Tokyo
1997 London

Delegation Member numerous bilateral and multilateral negotiations including maritime boundaries International Court of Justice boundary case (U.S. vs. Canada Gulf of Maine case 1984) fisheries and law of the sea meetings

United States Expert Witness in Supreme Court cases

U.S. vs. Alaska (1985-1980)
U.S. vs. Louisiana (Mississippi 1986)
U.S. vs. Maine (Mass. 1982)
U.S. vs. Maine (R.I. 1981)

United States Department of State Deputy Member United States Board on Geographic Names (1979-83)

TEACHING

2004 - 2005 **Georgetown University** Adjunct Professor
Course taught Political Geography of the Oceans

2005-07-2002 **Rhodes Academy** Lecturer
(Law of the Sea course Rhodes Greece)

1991-2005 **International Boundary Research Unit** Instructor maritime boundary workshops (Durham England and London England – about 7 times)

1994 **World Affairs Program** Royal Viking Cruise Line Lecturer

1976-1980 **George Mason University** Adjunct Professor
Courses taught Marine resource management world geography

1974-75 **University of North Carolina Chapel Hill** Instructor
Course taught cultural geography

1972 **University of Rhode Island** Instructor
Course taught political geography

OTHER PROFESSIONAL ACTIVITIES

Expert Witness on behalf of the Government of Guyana in the Republic of Guyana vs. Republic of Suriname Maritime Boundary Arbitration under Annex VII of the United Nations Convention on the Law of the Sea (March-December 2006)

Board of Advisors International Boundary Research Unit (IBRU) University of Durham, England (1990-2001)

Advisory Board *Geopolitics* (1989-1995)

Secretary International Geographical Union Marine Geography Study Group (1986-87)

Editorial Board *The Virginia Geographer* (1982-86)

Member Advisory Council at the Conference of International Straits of the World, Bellagio, Italy (1976)

HONORS

Department of State Superior Honor Award 2000-1984
Department of State Meritorious Honor Award 1988-1977
Department of Justice Commendation 1989

EDUCATION

University of North Carolina, Chapel Hill
PhD Geography 1980
Dissertation: A Geographical Analysis of the North Sea Continental Shelf Cases

University of Rhode Island
MA Geography 1973
Thesis: An Analysis of the Concept: Strategic Quality of International Straits: A Geographical Perspective with Focus on Petroleum Tanker Transit and on the Malacca Strait

Bucknell University
BA Political Science 1971

LECTURES AND SPEECHES

The United States-Mexico Western Gap Treaty: Law of the Sea Institute conference, Harte Institute, Texas A&M, Corpus Christi, March 2007

The Need for Offshore Certainty: The State of Affairs of Maritime Boundaries in the Caribbean: International Conference on Achieving Fiscal Stability in Upstream Oil and Gas, Houston, November 2006

Maritime Boundary Negotiations: National Considerations and the U.S.-Mexico Experience
International Conference on Advanced International Boundary Disputes in Oil and Gas
London (June 2006)

Maritime Claims and Boundaries in the Arctic – Columbia University (January 2006)

Hot Spots of Maritime Boundary Disputes – Global Impact on Oil and Gas Interests
Conference on International Border Dispute Resolution – Houston (September 2004)

Maritime Boundary Negotiations: National Considerations – Advisory Board on the Law of the
Sea Conference – International Hydrographic Organization – Monaco (October 2003)

Political Geography of the Oceans – Woodrow Wilson School of Public and
International Affairs – Princeton University (November 2002)

Issues in International Oceans Policy – University of Virginia School of Law (March
2002-07)

Future of Islands: Delimitation and Development – SEAPOL conference on Ocean Governance
and Sustainable Development – Bangkok (March 2001)

International Maritime Boundaries: Impact on Oil and Gas Interests – Resolving International
Border Disputes – Global Business Network Ltd – London – 2000

Geography and U.S. ocean policy – Bucknell University (March 2002 – April 1989)

Baselines: Normal, Straight and Archipelagic – Institute of Petroleum – International
conference on – Oil Under Troubled Waters: An Introduction to Maritime
Jurisdiction and Boundary Disputes – London (November 2000)

International Maritime Boundaries: Impact on Oil and Gas Interests – Global Business
Network Limited – Resolving International Border Disputes – (London – July 2000)

United States – Canada Maritime Boundaries: A Study of Negotiations, Arbitration and
Management – Korea Maritime Institute Conference on Marine Policy and the
Korea Economy: Issues and Opportunities (Seoul, Korea – October 1998)

Navigation Considerations in East Asian Waters – Geopolitics and International
Boundaries Research Centre's Conference on Island and Maritime Disputes of
South East Asia (London – May 1993)

United States – Russia Maritime Boundary – International Boundary Conference
Durham University (Durham – England – July 1991)

The State Practice of National Maritime Claims and the Law of the Sea – University of
Virginia School of Law conference on – State Practice and the 1982 Law of the Sea
Convention (Cascais – Portugal – April 1990)

Navigation and Overflight Rights in the Law of the Sea – Cannon Air Force Base (April 1986)

Law of the Sea and the United States – Bucknell University (April 1986)

The Geopolitics of the Arctic 52 annual meeting of the Assoc. of American Geographers
(Detroit April 1985)

National Claims and the Geography of the Arctic Law of the Sea Institute Conference
(San Francisco September 1984)

U.S. Canadian Maritime Relations and Geographical Aspects of Foreign Affairs Bucknell
University (October 1984)

Political Geography and the law of the sea East Stroudsburg State College (Sept. 1980)

Geographic influences on the political and economic development in the Pacific Bucknell
University (October 1979)

National Maritime Claims International Studies Association 20th annual conference (Toronto
March 1979)

Geography of Maritime boundary delimitation Assoc. of American Geographers annual
meeting (New Orleans April 1978)

PUBLICATIONS

Books

David A. Colson and Robert W. Smith (eds) *International Maritime Boundaries* Vol. V The
American Society of International Law Martinus Nijhoff Publishers March 2005

Jonathan I. Charney and Robert W. Smith (eds) *International Maritime Boundaries*
Vol. IV The American Society of International Law Martinus Nijhoff Publishers 2002

J. Ashley Roach and Robert W. Smith *United States Responses to Excessive Maritime
Claims* 2nd edition Martinus Nijhoff Publishers 1996

J. Ashley Roach and Robert W. Smith *Excessive Maritime Claims* International Law
Studies Vol. 66 U.S. Naval War College 1994

Robert W. Smith *Exclusive Economic Zone Claims: An Analysis and Primary
Documents* Martinus Nijhoff Publishers 1986

Monographs

Robert W. Smith and Bradford L. Thomas *Island Disputes and the Law of the Sea: An
Examination of Sovereignty and Delimitation Disputes* Maritime Briefing Volume
2 Number 4 International Boundaries Research Unit 1998

Robert W. Smith National Maritime Claims 1958-85 *Geographic Research Study*
No. 20 1985 Office of The Geographer U.S. Department of State

Book Chapters

- With J. Ashley Roach 'Continental Shelf Boundaries' in *International Maritime Boundaries* Vol V Colson and Smith (eds) Martinus Nijhoff Publishers 2005
- With J. Ashley Roach 'Kazakhstan - Russia - Azerbaijan - Russia - Azerbaijan - Kazakhstan - Azerbaijan - Kazakhstan - Russia' in *International Maritime Boundaries* Vol V Colson and Smith (eds) Martinus Nijhoff Publishers 2005
- With George Titt 'Legal Aspects of the Continental Shelf' (chapter 3) in Peter J. Cook and Chris M. Carleton (eds) *Continental Shelf Limits: The Scientific and Legal Interface* Oxford University Press 2000
- With J. Ashley Roach 'Navigational Rights and Responsibilities in International Straits' (Chapter 14) in *The Straits of Malacca* Hamzah Ahmad (ed) Pelanduk Publications 1997
- Joint Development Zones: A Review of Past Practice and Thoughts on the Future in *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21* Mochtar Kusuma Atmadja, Thomas A. Mensah and Bernard Oxman (eds) The Law of the Sea Institute 1995
- United States - Russia Maritime Boundary In *Maritime Boundaries* Volume 5 of World Boundaries Gerald H. Blake (ed) (Routledge 1994) 91-102
- Cuba - United States - Mexico - United States - Cook Islands - United States - New Zealand (Tokelau) - United States in *International Maritime Boundaries* Vol I Charney and Alexander (eds) Martinus Nijhoff Publishers 1993
- Navigational Issues in the Law of the Sea (Chapter 6) in *Maritime Issues in the 1990s* Dalchoong Kim et al (eds) Institute of East and West Studies Yonsei University 1992
- United States - Russia Maritime Boundary International Boundary Research Unit international conference 1991
- Establishing Maritime Boundaries: The United States Experience In *International Boundaries and Boundary Conflict Resolution* C. Grundy Warr (ed) International Boundary Research Unit Durham England 1990
- Geographic Considerations in Maritime Boundary Delimitations (Chapter 1) in Dorinda G. Dallmeyer and Louis DeVorse, Jr (eds) *Rights to Oceanic Resources* Martinus Nijhoff Publishers 1989
- Global Maritime Claims: The Current Status (Chapter 1) in *Global Ocean Politics* Dalchoong Kim, Choon-ho Park and Seo-Hang Lee (eds) Institute of East and West Studies Yonsei University 1989
- National Claims and the Geography of the Arctic Law of the Sea Institute's San Francisco conference 1984

The Effect of Extended Maritime Jurisdiction on Land Sovereignty Disputes in *The 1982 Convention on the Law of the Sea* Albert Koers in (Bernard Oxman (eds) *Law of the Sea Institute* 1983

With Robert D. Hodgson 'Unilateralism: The Wave of the Future' (Chapter 9) in *Law of the Sea Conference Outcomes and Problem of Implementation* Edward Miles and John King Gamble (eds) Ballinger Publishing Company 1976

With Robert D. Hodgson 'Boundaries of the Economic Zone' (Chapter 10) in *Law of the Sea Conference Outcomes and Problem of Implementation* Edward Miles and John King Gamble (eds) Ballinger Publishing Company 1976

Coastal Planning and Carteret (North Carolina) Fishermen in *Carrying Capacity: A Basis for Coastal Planning* D. Godschalk and F. Parker (eds) Univ. of North Carolina Press 1974

Articles

With J. Ashley Roach 'Straight Baselines: The Need for a Universally Applied Norm' *Ocean Development and International Law* 31: 47-80 2000

National Maritime Claims *Ocean Development and International Law* Vol. 20 1989 83-103

A Geographical Primer to Maritime Boundary Making *Ocean Development and International Law* Vol. 12:1-2 1982 1-22

Maritime Boundaries of the United States *The Geographical Review* Vol. 71 1981 395-410

Trends in National Maritime Claims *Professional Geographer* 32(2) 1980 216-223

With Robert D. Hodgson 'Boundary Issues Created By Extended National Marine Jurisdictions' *The Geographical Review* Vol. 69 No. 4 October 1979 423-433

With Robert D. Hodgson 'The Informal Single Negotiating Text (Committee II): A Geographical Perspective' *Ocean Development and International Law Journal* Volume 3 Number 3 1976 225-259

The Political Geography of the Marine Environment *The Geographical Bulletin* Vol. 10 1975

An Analysis of the Strategic Attributes of International Straits: A Geographical Perspective *Maritime Studies and Management* 1974

Oceanborne Shipment of Petroleum and the Impact of Straits on VLCC Transit *Maritime Studies and Management* 1973

Author (or co-author) of following U.S. Department of State *Limits in the Seas* studies

- No. 36 National Claims to Maritime Jurisdiction (418 revisions)
- No. 62 Continental Shelf Boundary India-Indonesia August 25 1975
- No. 63 Continental Shelf Boundary Iran-U.A.E (Dubai) September 30 1975
- No. 64 Continental Shelf Boundary Argentina-Uruguay October 24 1975
- No. 67 Continental Shelf Boundary Iran-Oman January 1 1976
- No. 68 Territorial Sea and Continental Shelf Boundary Guinea-Bissau-Senegal March 15 1976
- No. 69 Maritime Boundary Colombia-Ecuador April 1 1976

- No 71 Continental Shelf Boundary Finland Sweden June 10 1976
- No 73 Maritime Boundary Brazil Uruguay September 30 1976
- No 74 Maritime Boundary FRG GDR October 5 1976
- No 75 Continental Shelf Boundary and Joint Development Zone Japan Republic of Korea September 2 1977
- No 76 Straight Baselines Cuba October 28 1977
- No 77 Maritime Boundaries India Sri Lanka February 16 1978
- No 78 Maritime Boundary India Maldives and Maldives Claimed Economic Zone July 24 1978
- No 79 Maritime Boundaries Colombia Panama November 3 1978
- No 82 Straight Baselines Korea January 22 1979
- No 84 Maritime Boundary Colombia Costa Rica February 15 1979
- No 85 Maritime Boundary The Gambia Senegal March 23 1979
- No 86 Maritime Boundary Chile Peru July 2 1979
- No 88 Maritime Boundary Ecuador Peru October 2 1979
- No 90 Continental Shelf Boundary Italy Spain May 14 1980
- No 91 Maritime Boundary United States Venezuela December 16 1980
- No 92 Territorial Waters Boundary Kenya Tanzania May 15 1981
- No 93 Continental Shelf Boundaries India Indonesia Thailand August 17 1981
- No 94 Continental Shelf Boundaries The Persian Gulf September 11 1981
- No 95 Maritime Boundary France (Reunion) -Mauritius April 16 1982
- No 97 Maritime Boundaries Costa Rica - Panama December 6 1982
- No 98 Archipelagic Straight Baselines Sao Tome and Principe November 1 1983
- No 100 Maritime Boundaries United States Cook Islands and United States New Zealand (Tokelau) December 30 1983
- No 101 Fiji's Maritime Claims November 30 1984
- No 103- Straight Baselines Colombia April 30 1985
- No 104 Maritime Boundary Cuba Mexico September 10 1985
- No 105 Maritime Boundaries Colombia Dominican Republic and Netherlands Venezuela January 22 1986
- No 106 Developing Standard Guidelines for Evaluating Straight Baselines with P Bernhardt and G Greiveldinger August 31 1987
- No 107 Straight Baselines USSR (Pacific Sea of Japan Sea of Okhotsk and Bering Sea) September 30 1987
- No 108 Maritime Boundaries of the World (rev 1) November 30 1990
- No 109 Continental Shelf Boundary Turkey USSR and Straight Baselines USSR (Black Sea) with D Dzurek September 28 1988
- No 110 Maritime Boundary Cuba United States February 21 1990
- No 111 Straight Baseline Costa Rica August 17 1990
- No 112 United States Responses to Excessive Maritime Claims with A Roach March 9 1992
- No 113 Straight Baseline Claims Djibouti and Oman April 22 1992
- No 114 Iran's Maritime Claims March 16 1994
- No 115 United States United Kingdom Maritime Boundaries in the Caribbean April 11 1994
- No 116 Straight Baseline Claims Albania and Egypt May 6 1994
- No 117 Straight Baseline Claim China July 9 1996
- No 118 Straight Baseline Claim Pakistan December 20 1996
- No 119 Maritime Boundary Niue United States July 30 1997
- No 120 Straight Baseline and Territorial Sea Claim Japan April 30 1998
- No 121 Straight Baseline and Territorial Sea Claim South Korea September 30 1998
- No 122 Straight Baseline Claim Thailand with S Morison September 8 2000
- No 123 Uruguay's Maritime Claims with S Morison November 27 2000
- No 124 Straight Baseline Claim Honduras June 28 2001

- No. 125 Jamaica's Maritime Claims and Boundaries February 4, 2004
- No. 126 Maldives Maritime Claims and Boundaries September 8, 2005
- No. 127 Taiwan's Maritime Claims with A. Roach November 15, 2005

August 2007

dr_rwsmith@yahoo.com

In the area of the Blake Plateau, the Straits of Florida and Eastern Gulf of Mexico the limit of the exclusive economic zone shall be determined by

[illegible]

Per seep points 120 and 110 the limit of the exclusive economic zone is 200 nautical miles seaward from the base line from which the territorial sea is measured.

1. The error is a lexical error
in the first line of the program
in the first line of the program
in the first line of the program
in the first line of the program

[illegible]

Between points 4 and 4, the average number of times a bird from the same flock within the error class is measured.

In the western half of Mexico, the limit of the extensive economic zone is determined by straight lines connecting the following coordinates:

4	48	3	1
44	6	5	6
14	6	6	9
46	8	7	2

From point 146 the limit of United States jurisdiction, heretofore established by the United States of America and the United Mexican States in Article 1A and annexes of the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary signed at Mexico City November 23 1970 and entered into force April 18 1972 TIAS No. 313 23 LST 3/1

**U S Pacific Coast (Washington Oregon
and California)**

In the area seaward of the Strait of Juan de Fuca the limit of the exclusive economic zone shall be determined by straight lines connecting the points with the following coordinates ¹

1	48	29	37	19	N	124	4	33	19	W
	49	30	11	N	1	4	4	17		
3	48	30	72	N	124	50	21	W		
4	48	30	14	N	124	54	7	N		
	49	29	5	N	124	59	4	W		
6	48	23	44	N	1	06	06	W		
	48	28	09	N	1	5	0	4	N	
8	48	2	1	N	1	5	8	1	W	
	48	26	4	N	1	5	0	1	W	
10	48	01	16	N	12	2	48			
11	49	18	22	N	12	29	8	N		
12	49	11		N	1	5	53	48		
13	4	19	15		126	40				
14	4	36	47		12	11	8	N		
1	4	72	C		1	41	2	N		
16	46	42			1	1	0			
			1							

Between point 1 and 9 the limit of the exclusive economic zone is 100 nautical miles seaward from the baseline from which the breadth of the territorial sea is measured in the Gulf of St. John, California, as the limit needs to be determined with respect to the continental shelf.

[illegible]

Point 1 is located in the Bering Sea, 100 nautical miles from the coast of Alaska. The limit of the exclusive economic zone shall be determined by straight lines connecting the following coordinates:

Alaska

Off the coast of Alaska in the area of the Bering Sea the limit of exclusive economic zone shall be determined by straight lines connecting the following coordinates:

1 19 44 88 N 14 50 W
2 63 24 N 140 05 E
3 69 39 N 140 30 E
4 13 41 N 140 38 W
5 69 41 N 140 00 E
6 69 46 N 140 17 W
7 69 44 N 140 40 W
8 69 51 N 140 42 W
9 0 09 N 140 19 W
10 11 13 N 140 09 W
11 11 09 N 140 05 W
12 11 09 N 140 04 W
13 11 09 N 140 04 W
14 11 09 N 140 04 W
15 11 09 N 140 04 W
16 11 09 N 140 04 W
17 11 09 N 140 04 W
18 11 09 N 140 04 W
19 11 09 N 140 04 W
20 11 09 N 140 04 W
21 11 09 N 140 04 W
22 11 09 N 140 04 W

Between point 2 and point 22 the limit of the exclusive economic zone is 200 nautical miles seaward from the baseline from which the territorial sea is measured in the Bering Sea, Bering Strait and northern Bering Sea the limit of the exclusive economic zone shall be determined by straight lines connecting the following coordinates:

1 11 09 N 140 04 W
2 11 09 N 140 04 W
3 11 09 N 140 04 W
4 11 09 N 140 04 W
5 11 09 N 140 04 W
6 11 09 N 140 04 W
7 11 09 N 140 04 W
8 11 09 N 140 04 W
9 11 09 N 140 04 W
10 11 09 N 140 04 W
11 11 09 N 140 04 W
12 11 09 N 140 04 W
13 11 09 N 140 04 W
14 11 09 N 140 04 W
15 11 09 N 140 04 W
16 11 09 N 140 04 W
17 11 09 N 140 04 W
18 11 09 N 140 04 W
19 11 09 N 140 04 W
20 11 09 N 140 04 W
21 11 09 N 140 04 W
22 11 09 N 140 04 W

Point 1 is located in the Bering Sea, 100 nautical miles from the coast of Alaska. The limit of the exclusive economic zone shall be determined by straight lines connecting the following coordinates:

Between points 58 and 59 the limit of the exclusive economic zone is 200 nautical miles seaward from the baseline from which the territorial sea is measured. In the southern Bering Sea and north Pacific Ocean the limit of the exclusive economic zone shall be determined the straight lines connecting the following coordinates:

1 61 16 N 140 00 E
2 61 16 N 140 00 E
3 61 16 N 140 00 E
4 61 16 N 140 00 E
5 61 16 N 140 00 E
6 61 16 N 140 00 E
7 61 16 N 140 00 E
8 61 16 N 140 00 E
9 61 16 N 140 00 E
10 61 16 N 140 00 E
11 61 16 N 140 00 E
12 61 16 N 140 00 E
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25 61 16 N 140 00 E
26 61 16 N 140 00 E
27 61 16 N 140 00 E
28 61 16 N 140 00 E
29 61 16 N 140 00 E
30 61 16 N 140 00 E
31 61 16 N 140 00 E
32 61 16 N 140 00 E
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36 61 16 N 140 00 E
37 61 16 N 140 00 E
38 61 16 N 140 00 E
39 61 16 N 140 00 E
40 61 16 N 140 00 E
41 61 16 N 140 00 E
42 61 16 N 140 00 E
43 61 16 N 140 00 E
44 61 16 N 140 00 E
45 61 16 N 140 00 E
46 61 16 N 140 00 E
47 61 16 N 140 00 E
48 61 16 N 140 00 E
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Between point 58 and point 59 the limit of the exclusive economic zone is 200 nautical miles seaward from the baseline from which the territorial sea is measured.

Point 58 is located in the Bering Sea, 100 nautical miles from the coast of Alaska. The limit of the exclusive economic zone shall be determined by straight lines connecting the following coordinates:

Point 59 is located in the Bering Sea, 100 nautical miles from the coast of Alaska. The limit of the exclusive economic zone shall be determined by straight lines connecting the following coordinates:

Point 60 is located in the Bering Sea, 100 nautical miles from the coast of Alaska. The limit of the exclusive economic zone shall be determined by straight lines connecting the following coordinates:

Point 61 is located in the Bering Sea, 100 nautical miles from the coast of Alaska. The limit of the exclusive economic zone shall be determined by straight lines connecting the following coordinates:

[illegible]

Proclamation 5030 by the President of the United States of America on
the Exclusive Economic Zone of the United States of America,
10 March 1983

WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law

WHEREAS international law recognizes that in a zone beyond its territory and adjacent to its territorial sea known as the exclusive economic zone a coastal State may assert certain sovereign rights over natural resources and related jurisdiction and

WHEREAS the establishment of an exclusive economic zone by the United States will advance the development of ocean resources and promote the protection of the marine environment while not affecting other lawful uses of the zone including the freedoms of navigation and overflight by other States

NOW THEREFORE I RONALD REAGAN by the authority vested in me as President by the Constitution and laws of the United States of America do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an exclusive economic zone as described herein

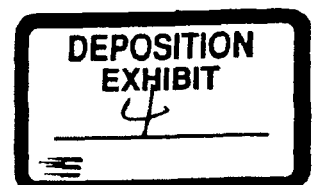
The exclusive economic zone of the United States is a zone contiguous to the territorial sea including zones contiguous to the territorial sea of the United States the Commonwealth of Puerto Rico the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement) and United States overseas Territories and possessions The exclusive economic zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured In cases where the maritime boundary with a neighbouring State remains to be determined the boundary of the exclusive economic zone shall be determined by the United States and other State concerned in accordance with equitable principles

Within the exclusive economic zone the United States has to the extent permitted by international law (a) sovereign rights for the purpose of exploring exploiting conserving and managing natural resources both living and non living of the sea bed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone such as the production of energy from the water currents and winds and (b) jurisdiction with regard to the establishment and use of artificial islands and installations and structures having economic purposes and the protection and preservation of the marine environment

This Proclamation does not change existing United States policies concerning the continental shelf marine mammals and fisheries including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management

The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law

Without prejudice to the sovereign rights and jurisdiction of the United States the exclusive economic zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation overflight the laying of submarine cables and pipelines and other internationally lawful



Page -

uses of the Sea

IN WITNESS WHEREOF I have hereunto set my hand this tenth day of March in the year of our Lord nineteen hundred and eighty three and of the Independence of the United States of America the two hundred and seventh

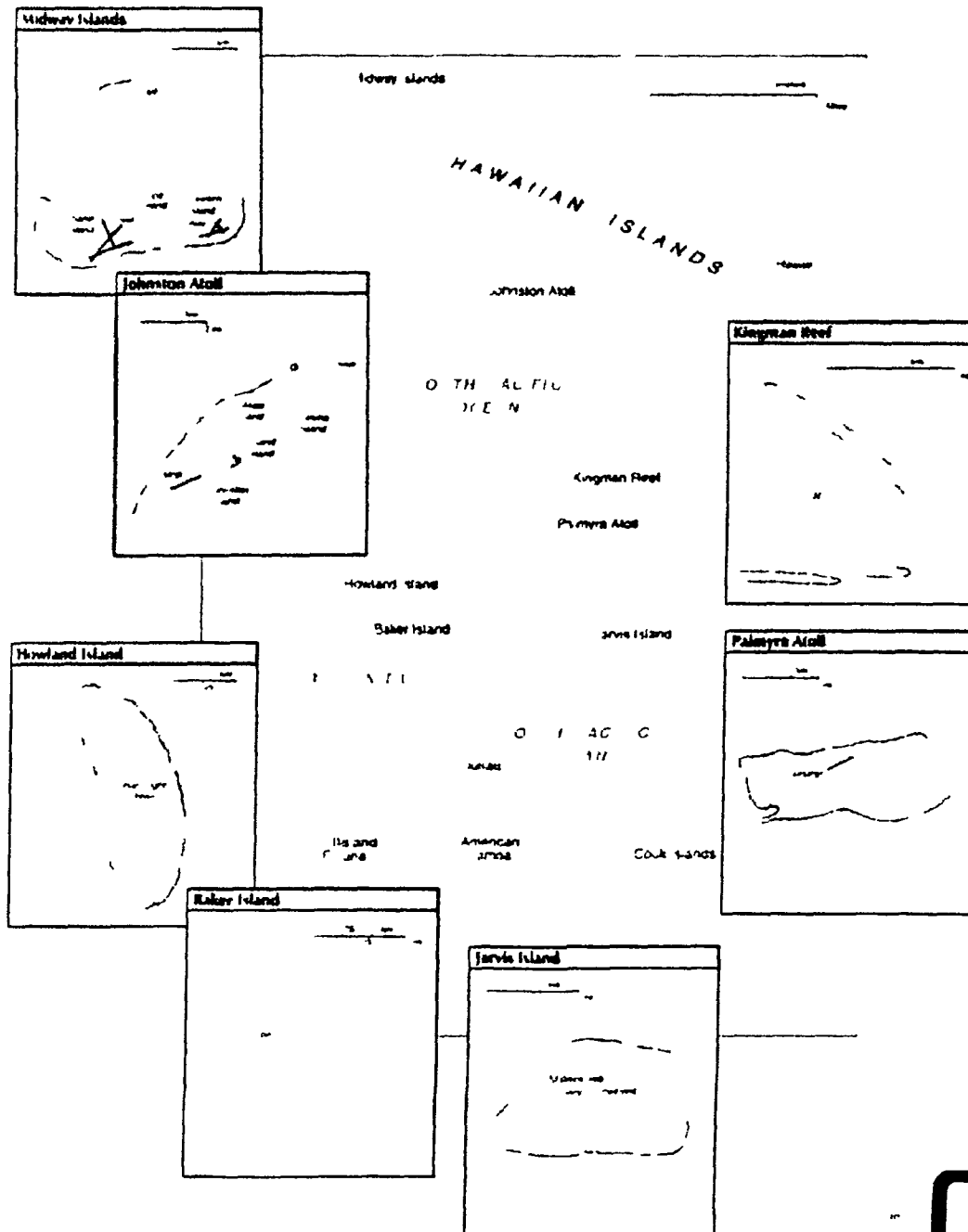
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Office of the Press Secretary

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The World Factbook



United States Pacific Island Wildlife Refuges



Introduction United States Pacific Island Wildlife Refuges

Background The following US Pacific island territories constitute the Pacific Remote Islands National Wildlife Refuge Complex and as such are managed by the Fish and Wildlife Service of the US Department of Interior. These remote refuges are the most widespread collection of marine and terrestrial life protected areas on the planet under a single country's jurisdiction. They protect many endemic species including corals, fish, shellfish, marine mammals, seabirds, water birds, land birds, insects, and vegetation not found elsewhere.

Baker Island The US took possession of the island in 1857, and its guano deposits were mined by US and British companies during the second half of the 19th century. In 1935, a short-lived attempt at colonization began on this island but was disrupted by World War II and thereafter abandoned. The island was established as a National Wildlife Refuge in 1974.

Howland Island Discovered by the US early in the 19th century, the island was officially claimed by the US in 1857. Both US and British companies mined for guano until about 1890. In 1935, a short-lived attempt at colonization began on this island, similar to the effort on nearby Baker Island, but was disrupted by World War II and thereafter abandoned. The famed American aviatrix Amelia EARHART disappeared while seeking out Howland Island as a refueling stop during her 1937 round the world flight. Earhart Light, a day beacon near the middle of the west coast, was named in her memory. The island was established as a National Wildlife Refuge in 1974.

Jarvis Island First discovered by the British in 1821, the uninhabited island was annexed by the US in 1858 but abandoned in 1879 after tons of guano had been removed. The UK annexed the island in 1889 but never carried out plans for further exploitation. The US occupied and reclaimed the island in 1935 until it was abandoned in 1942 during World War II. The island was established as a National Wildlife Refuge in 1974.

Johnston Atoll Both the US and the Kingdom of Hawaii annexed Johnston Atoll in 1858, but it was the US that mined the guano deposits until the late 1880s. Johnston and Sand Islands were designated wildlife refuges in 1926. The US Navy took over the atoll in 1934, and subsequently the US Air Force assumed control in 1948. The site was used for high altitude nuclear tests in the 1950s and 1960s, and until late in 2000 the atoll was maintained as a storage and disposal site for chemical weapons. Munitions destruction is now complete. Cleanup and closure of the facility was completed by May 2005. The Fish and Wildlife Service and the US Air Force are currently discussing future management options. In the interim, Johnston Atoll and the three mile Naval Defensive Sea around it remain under the jurisdiction and administrative control of the US Air Force.

Kingman Reef The US annexed the reef in 1922. Its sheltered lagoon served as a way station for flying boats on Hawaii to American Samoa flights during the late 1930s. There are no terrestrial plants on the reef, which is frequently awash, but it does support abundant and diverse marine fauna and flora. In 2001, the waters surrounding the reef out to 12

nm were designated a US National Wildlife Refuge
Midway Islands The US took formal possession of the islands in 1867
 The laying of the trans Pacific cable which passed through the islands
 brought the first residents in 1903 Between 1935 and 1947 Midway was
 used as a refueling stop for trans Pacific flights The US naval victory
 over a Japanese fleet off Midway in 1942 was one of the turning points
 of World War II The islands continued to serve as a naval station until
 closed in 1993 Today the islands are a National Wildlife Refuge and are
 the site of the world's largest Laysan albatross colony
Palmyra Atoll The Kingdom of Hawaii claimed the atoll in 1862 and
 the US included it among the Hawaiian Islands when it annexed the
 archipelago in 1898 The Hawaiian Statehood Act of 1959 did not include
 Palmyra Atoll which is now partly privately owned by the Nature
 Conservancy with the rest owned by the Federal government and
 managed by the US Fish and Wildlife Service These organizations are
 managing the atoll as a wildlife refuge The lagoons and surrounding
 waters within the 12 nm US territorial seas were transferred to the US
 Fish and Wildlife Service and designated as a National Wildlife Refuge
 in January 2001

Geography United States Pacific Island Wildlife Refuges

Location Oceania
Baker Island atoll in the North Pacific Ocean 1 830 nm (3 389 km)
 southwest of Honolulu about half way between Hawaii and Australia
Howland Island island in the North Pacific Ocean 1 815 nm (3 361 km)
 southwest of Honolulu about half way between Hawaii and Australia
Jarvis Island island in the South Pacific Ocean 1 305 nm (2 417 km)
 south of Honolulu about half way between Hawaii and the Cook Islands
Johnston Atoll atoll in the North Pacific Ocean 717 nm (1 328 km)
 southwest of Honolulu about one third of the way from Hawaii to the
 Marshall Islands
Kingman Reef reef in the North Pacific Ocean 930 nm (1 722 km) south
 of Honolulu about half way between Hawaii and American Samoa
Midway Islands atoll in the North Pacific Ocean 1 260 nm (2 334 km)
 northwest of Honolulu near the end of the Hawaiian Archipelago about
 one third of the way from Honolulu to Tokyo
Palmyra Atoll atoll in the North Pacific Ocean 960 nm (1 778 km) south
 of Honolulu about half way between Hawaii and American Samoa

Geographic coordinates *Baker Island* 0 13 N 176 28 W
Howland Island 0 48 N 176 38 W
Jarvis Island 0 23 S 160 01 W
Johnston Atoll 16 45 N 169 31 W
Kingman Reef 6 23 N 162 25 W
Midway Islands 28 12 N 177 22 W
Palmyra Atoll 5 53 N 162 05 W

Map references Oceania

Area total 6 959 41 sq km emergent land 22 41 sq km submerged 6 937
 sq km

	<i>Baker Island</i> total 129 sq km emergent land 21 sq km submerged 127 sq km <i>Howland Island</i> total 159 sq km emergent land 26 sq km submerged 16 sq km <i>Jarvis Island</i> total 152 sq km emergent land 5 sq km submerged 147 sq km <i>Johnston Atoll</i> total 2766 sq km emergent land 26 sq km submerged 274 sq km <i>Kingman Reef</i> total 19801 sq km emergent land 001 sq km submerged 1958 sq km <i>Midway Islands</i> total 2552 sq km emergent land 62 sq km submerged 2549 sq km <i>Palmyra Atoll</i> total 19499 sq km emergent land 39 sq km submerged 1946 sq km
Area comparative	<i>Baker Island</i> about two and a half times the size of The Mall in Washington DC <i>Howland Island</i> about three times the size of The Mall in Washington DC <i>Jarvis Island</i> about eight times the size of The Mall in Washington DC <i>Johnston Atoll</i> about four and a half times the size of The Mall in Washington DC <i>Kingman Reef</i> a little more than one and a half times the size of The Mall in Washington DC <i>Midway Islands</i> about nine times the size of The Mall in Washington DC <i>Palmyra Atoll</i> about 20 times the size of The Mall in Washington DC
Land boundaries	none
Coastline	<i>Baker Island</i> 48 km <i>Howland Island</i> 64 km <i>Jarvis Island</i> 8 km <i>Johnston Atoll</i> 34 km <i>Kingman Reef</i> 3 km <i>Midway Islands</i> 15 km <i>Palmyra Atoll</i> 145 km
Maritime claims	<i>territorial sea</i> 12 nm <i>exclusive economic zone</i> 200 nm
Climate	<i>Baker Howland and Jarvis Islands</i> equatorial scant rainfall constant wind burning sun <i>Johnston Atoll and Kingman Reef</i> tropical but generally dry consistent northeast trade winds with little seasonal temperature variation <i>Midway Islands</i> subtropical with cool moist winters (December to February) and warm dry summers (May to October) moderated by prevailing easterly winds most of the 1067 mm (42 in) of annual rainfall occurs during the winter <i>Palmyra Atoll</i> equatorial hot located within the low pressure area of the Intertropical Convergence Zone (ITCZ) where the northeast and

	southeast trade winds meet it is extremely wet with between 4 000 to 5 000 mm (160 to 200 in) of rainfall each year
Terrain	low and nearly level sandy coral islands with narrow fringing reefs that have developed at the top of submerged volcanic mountains which in most cases rise steeply from the ocean floor
Elevation extremes	<i>lowest point</i> Pacific Ocean 0 m <i>highest point</i> Baker Island unnamed location 8 m Howland Island unnamed location 5 m Jarvis Island unnamed location 7 m Johnston Atoll Sand Island 10 m Kingman Reef unnamed location less than 1 m Midway Islands unnamed location 13 m Palmyra Atoll unnamed location 2 m
Natural resources	terrestrial and aquatic wildlife
Land use	<i>arable land</i> 0% <i>permanent crops</i> 0% <i>other</i> 100% (2005)
Natural hazards	<i>Baker Howland and Jarvis Islands</i> the narrow fringing reef surrounding the island can be a maritime hazard <i>Kingman Reef</i> wet or awash most of the time maximum elevation of less than 1 m makes Kingman Reef a maritime hazard <i>Midway Islands Johnston and Palmyra Atolls</i> NA
Environment current issues	<i>Baker Howland and Jarvis Islands and Johnston Atoll</i> no natural fresh water resources <i>Kingman Reef</i> none <i>Midway Islands and Palmyra Atoll</i> NA
Geography note	<i>Baker Howland and Jarvis Islands</i> scattered vegetation consisting of grasses prostrate vines and low growing shrubs primarily a nesting roosting and foraging habitat for seabirds shorebirds and marine wildlife <i>Johnston Atoll</i> Johnston Island and Sand Island are natural islands which have been expanded by coral dredging North Island (Akau) and East Island (Hikina) are manmade islands formed from coral dredging the egg shaped reef is 34 km in circumference <i>Kingman Reef</i> barren coral atoll with deep interior lagoon closed to the public <i>Midway Islands</i> a coral atoll managed as a national wildlife refuge and open to the public for wildlife related recreation in the form of wildlife observation and photography <i>Palmyra Atoll</i> the high rainfall and resulting lush vegetation make the environment of this atoll unique among the US Pacific Island territories it supports one of the largest remaining undisturbed stands of <i>Pisonia</i> beach forest in the Pacific
People	United States Pacific Island Wildlife Refuges
Population	no indigenous inhabitants

note public entry is by special use permit from US Fish and Wildlife Service only and generally restricted to scientists and educators visited annually by US Fish and Wildlife Service
Johnston Atoll in previous years an average of 1 100 US military and civilian contractor personnel were present as of May 2005 all US government personnel had left the island
Midway Islands approximately 40 people make up the staff of US Fish and Wildlife Service and their services contractor living at the atoll
Palmyra Atoll four to 20 Nature Conservancy and US Fish and Wildlife staff

Government United States Pacific Island Wildlife Refuges

Country name *conventional long form* none
conventional short form Baker Island Howland Island Jarvis Island Johnston Atoll Kingman Reef Midway Islands Palmyra Atoll

Dependency status unincorporated territories of the US administered from Washington DC by the Fish and Wildlife Service of the US Department of the Interior as part of the National Wildlife Refuge system
note on Palmyra Atoll incorporated Territory of the US partly privately owned and partly federally owned administered from Washington DC by the Fish and Wildlife Service of the US Department of the Interior the Office of Insular Affairs of the US Department of the Interior continues to administer nine excluded areas comprising certain tidal and submerged lands within the 12 nm territorial sea or within the lagoon

Legal system the laws of the US where applicable apply

Flag description the flag of the US is used

Economy United States Pacific Island Wildlife Refuges

Economy overview no economic activity

Transportation United States Pacific Island Wildlife Refuges

Airports *Baker Island* one abandoned World War II runway of 1 665 m covered with vegetation and unusable
Howland Island airstrip constructed in 1937 for scheduled refueling stop on the round the world flight of Amelia EARHART and Fred NOONAN the aviators left Lae New Guinea for Howland Island but were never seen again the airstrip is no longer serviceable
Johnston Atoll one closed and not maintained
Kingman Reef lagoon was used as a halfway station between Hawaii and American Samoa by Pan American Airways for flying boats in 1937 and 1958
Midway Islands 3 one operational (2 409 m paved) no fuel for sale except emergencies
Palmyra Atoll 1 1 846 m unpaved runway privately owned (2006)

Ports and terminals *Baker Howland and Jarvis Islands and Kingman Reef* none offshore anchorage only
Johnston Atoll Johnston Island
Midway Islands Sand Island
Palmyra Atoll West Lagoon

Military **United States Pacific Island Wildlife Refuges**

Military note defense is the responsibility of the US

Transnational Issues **United States Pacific Island Wildlife Refuges**

Disputes international none

This page was last updated on 20 September 2007

**Comments on
Jon Van Dyke's Report
For the
Marshall Islands 201 Case**

**By Dr Robert W Smith
September 2007**

1 Mr Van Dyke has quoted an article that Dr Robert Hodgson (then The Geographer of the U.S. Department of State) and I (then an Assistant Geographer in the U.S. Department of State) wrote in 1976 in which we analyzed the geographical aspects of the negotiating text that was before the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹ Mr Van Dyke implies that by what we wrote in this article that we agree with his assessment of what became Article 121 (3) on rocks. This is a mischaracterization of the position that Dr Hodgson and I took at the time and to which I continue to maintain. I believe that the paragraph as written lacks an objective definition that allows a reasoned application.

2 What became Article 121 (3) of the LOS Convention was Article 132 of Working Paper 8 that became the Informal Single Negotiating Text (ISNT) of UNCLOS III. In our opening statement of the subject of rocks, Hodgson and I said that this paragraph raises further complications for an already difficult issue that of islands, and that the paragraph contains the seed of the problem. The basic problem was of interpretation and definition. We asked: (1) What constitutes a rock as a form of an island? And (2) What is meant by "cannot sustain human habitation or economic life of their own"?²

3 We then went into a discussion of definition, particularly as it related to size. And I should note that Mr Van Dyke did not even quote us correctly, for we wrote that "it appears fairly obvious that 'rock' is intended to refer to a **smaller** sized island."⁴ We said that "if the Hodgson definition [of a rock] is accepted as a reasonable limit, then to what islands would the term apply? By definition, the island must be smaller than 27,878 sq ft or 2,590 sq m. This island if square would measure approximately 51 m on a side or if circular have a radius of approximately 28.7 m."⁵ The area of Howland Island of 1.64 sq kilometers, as cited by Mr Van Dyke out of the noted reference Wikipedia⁶, greatly exceeds that of the Hodgson rock.

4 We then wrote:

Expert report of Jon M. Van Dyke (Van Dyke, pp. 6 and footnote 13).
Robert D. Hodgson and Robert W. Smith (Hodgson and Smith), "The Informal Single Negotiating Text (Committee II): A Geographical Perspective," *Ocean Development and International Law Journal*, Vol. 3, No. 3, 1976, 230.

²Id.

⁴Id.

⁵Id. p. 23.

Van Dyke, p. 2.

The second question — what is meant by can not sustain human habitation or economic life of their own — must be dealt with logically, to qualify the rock must meet one of the two implicit criteria

We note that the definition does not refer to uninhabited rocks but rather to uninhabitable rocks. Consequently it is assumed that some uninhabited rocks may have economic zones because they could sustain human habitation or they could have an economic life of their own. People may prefer not to inhabit the particular rock owing to other factors

We continue with the analysis of the language in this paragraph by noting that many mainland areas and larger islands also possess the conditions of not having water or vegetation and that certain areas are inhabited as a result of the importation of water or desalinization of seawater to sustain life. Thus, we point out any rock could support human habitation if the state was willing to spend enough money for example a rock with a lighthouse built upon it sustains human habitation by external expenditure of funds by the state which gives the rock an economic life of its own in its value to shipping ocean sports and so forth.⁸

5 Our article then continues by examining where these rocks may be located worldwide. The vast majority of them would be coastal with nearby larger islands. We noted that thousands likely existed immediately offshore the coasts of places like Alaska, Chile, Australia, China, Korea, and Cuba. Few of these coastal rocks would seriously affect a state's maritime claim, if at all.

6 We did note a few non-coastal features that possibly could be considered a rock under the definition provided. Rockall, a British feature, has been the only rock acknowledged by the coastal State. Rockall has an area of 624 sq. m.⁹

7 We raised an additional problem in our article. And that is that under a strict reading of the negotiating text, a low tide elevation situated within the territorial sea (e.g. within 12 n. miles) of an island or mainland is considered a part of the baseline. Therefore, a low tide elevation would be allowed to generate an exclusive economic zone or perhaps even a continental shelf, whereas a particular type of rock, which is above the water at all times, would not. As we noted, the equity of this development would seem very difficult to determine, and the validity of the concept is hard, indeed impossible, to justify.¹⁰

8 Hodgson and I concluded therefore that the paragraph on rocks should be eliminated [from the negotiating text] for geographical reasons as being impossible to administer. If for other reasons this paragraph must remain, it is essential that a rock be defined objectively so as to remove all doubt as to which rocks would be affected by this

Hodgson and Smith, p. 231

⁸ Ibid.

⁹ Ibid. p. 232

¹⁰ Ibid. p. 233

provision.¹ Unfortunately the text as written in the ISNT remained and the difficulty of defining an Article 121 (-) rock and applying it remains today.

9 It should be noted that if Mr. Van Dyke's approach to this Article 121 (3) were applied as he writes, then many Howland Island-sized islands that are presently uninhabited could very well be identified in the Pacific Ocean area and adversely affect the exclusive economic zone and continental shelf claims of states such as Kiribati, Marshall Islands, the Federated States of Micronesia, and Palau.

10 It should also be noted that Mr. Van Dyke's contention that under article 121(3) of the LOS Convention the United States is not entitled to claim an EEZ or a continental shelf around Howland and Baker Islands has never been argued by the United States or Kiribati. In fact, as is well documented in the Federal Register Notices, the United States has claimed an exclusive economic zone around Howland and Baker Islands. This assertion of maritime jurisdiction has never been challenged by any State.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE TERRITORY OF GUAM
3 UNITED STATES OF AMERICA CIVIL NO. 07-00033
4 Plaintiff
5 vs
6 JAFS-ALLS 2
7 Defendant
8
9
10
11
12

13 DEPOSITION OF JON M VAN DYKE
14 Taken on behalf of Plaintiff at the Offices of
15 NOAA Office of General Counsel Suite 1110 1601
16 Kapolani Boulevard Honolulu Hawaii 96814
17 commencing at 9 09 a m on Wednesday October 31st
2007 pursuant to Notice

18
19
20
21
22
23 BEFORE PATRICIA A CAMPBELL CSR 100
24 Certified shorthand Reporter
25 State of Hawaii

Ralph Eosenberg Court Reporters Inc
246 American Savings Bank 1001 Bishop Street
Honolulu Hawaii 96822 (808) 524-2090

Attachment
D

1 A Well Japan would be one which claims an
2 exclusive economic zone around a reef system called
3 Okino Torishima

4 Q And others?

5 A Do you want a spelling?

6 Q Oh yes please a spelling for the court
7 reporter

8 A O K I N O T O R O S H I M A

9 Q And the others?

10 A France appears to claim an exclusive
11 economic zone around Clipperton

12 Q Clipperton off the coast of Mexico?

13 A It s about 750 miles south of Acapulco

14 Q Okay

15 A New Zealand claims exclusive economic
16 zones around some remote islands that perhaps do not
17 qualify

18 Q Australia?

19 A Many of these are still in conflict and
20 being resolved Judge Vukas of the International
21 Tribunal for the Law of the Sea raised questions
22 about Australia's claims around some of its islands
23 in the southern ocean

24 Q Judge Vukas can you identify where he
25 was?

1 A Yes Vukas V U K A S he was a judge on
2 the International Tribunal for the Law of the Sea

3 Q Was he the president of the
4 International Tribunal?

5 A No he was not

6 Q He was the vice-president?

7 A I'm not sure what he was but he was a
8 judge on that International Tribunal for the Law of
9 the Sea

10 Q Okay Was there a president of the
11 tribunal at the same time that he was on that
12 tribunal?

13 A Yes of course

14 Q Did he have a different opinion than
15 Judge Vukas?

16 A None of the other judges gave their
17 opinion on this issue

18 Q When Judge Vukas gave his opinion did
19 he do it to disassociate himself from the other
20 members of the panel?

21 A He wrote a separate opinion giving his
22 views

23 Q Did he use the words I disassociate
24 myself with the rest of the commission?

25 A I don t recall what words he used but

1 he did seek to present his views on that issue

2 Q So you don't recall whether he was
3 seeking to express a view that was a minority
4 opinion on that commission?

5 A It s not clear that it was a minority
6 opinion but he thought that he wanted -- he wanted
7 to give his views on an issue that the rest of the
8 court had not addressed directly

9 Q So he disagreed with the court that
10 recognized an EEZ around an island?

11 A I don t support that characterization of
12 his views

13 Q That s not what he stated in his
14 opinion?

15 A He stated in his opinion that the
16 uninhabitable islands should not generate an
17 exclusive economic zone because of the rationale for
18 the exclusive economic zones which is to recognize
19 the link between coastal communities and coastal
20 resources

21 Q How many other judges were on that
22 panel?

23 A There are 21 judges on the court

24 Q 21 judges and how many joined him in
25 his opinion?

1 A No other judge joined him in his
2 opinion

3 Q So that was a sole opinion in 21 judges?

4 A It was a separate opinion giving his
5 views on a topic that was not addressed by the other
6 judges

7 Q Okay but you still would say that
8 that's a majority opinion?

9 MR WALSH Asked and answered You
10 have already asked that question and he has
11 answered it

12 Q (By Mr Schwab) And your answer is?

13 A Judge Vukas was expressing his views on
14 this topic based on his active participation in the
15 Law of the Sea negotiations and his work as a
16 scholar and diplomate and it's a sound opinion
17 that's well supported by the negotiating history and
18 the previous thinking and writing on this topic

19 Q So that's what you mean by a consensus
20 is that it? Was he a part of the consensus?

21 A His views accurately expressed the
22 underlying rationale for the exclusive economic
23 zone

24 Q Which you would describe as a part of a
25 consensus among academics I think that was your

1 a zone around a feature called Rockall

2 Q Let s talk about Rockall What is
3 Rockall can you describe that?

4 A It s a granite structure northwest of
5 Scotlard

6 Q When you say granite structure how
7 large is the structure?

8 A Oh 200 meters high approximately

9 Q 200 meters high and is there a
10 shoreline to this structure?

11 A It's a granite structure emerging out of
12 the sea and yes of course there s a shoreline in
13 the sense that there's a place where land and water
14 meet

15 Q So you say that there's a shoreline in
16 that water meets the land?

17 A Yes

18 Q But is there a shore in the sense that
19 there's a beach or an area that someone could land a
20 vessel?

21 A There have been landings on Rockall but
22 it's difficult

23 Q why is it difficult?

24 A Because it s a - a structure that
25 emerges rather dramatically from the ocean

1 Q Were you about to say that it's a rock
2 is that what you were - you said it s a and was
3 that rock that you were about to say?

4 A No

5 Q It's not a rock?

6 A It's a granite structure that is called
7 Rockall obviously because it looks like a huge
8 rock yes

9 Q So it's a huge rock that sticks out of
10 the water?

11 A It gives the appearance of being a huge
12 rock yes

13 Q And how large is it do you know?

14 A I don't have the measurements in my
15 mind

16 Q Is it big enough to land a helicopter
17 on?

18 A I believe there has been an attempt to
19 put a helicopter landing pad on it

20 Q So it's not big enough to be easy to put
21 a helicopter on?

22 A No it s not

23 Q And it sticks out of the ocean How
24 high does it stick up?

25 A Well it sticks up pretty high but I

1 don't have the exact figure in my mind

2 Q And it's sheer walls?

3 A It is fairly sheer walls yes

4 Q And how many miles off the coast of
5 Great Britain is that?

6 A I don't have those figures in my mind

7 Q Okay and was that a contested area?
8 Was that an area that when they tried to explore an
9 EEZ around it and there were protests, problems
10 from other states?

11 A Yes

12 Q So that was a contested area?

13 A Yes it was

14 Q Okay and who contested it do you know?

15 A I believe the Faroes and Iceland raised
16 objections

17 Q So these were other states that raised
18 the objections?

19 A That is correct

20 Q Let me show you what we will mark as
21 Government's Exhibit Number 2 just so you can see
22 that

23 (Deposition Exhibit 2 was marked for
24 identification ,

25 MR WALSH I am going to object lack

1 of foundation

2 MR SCHWAB Okay

3 MR WALSH I have no idea whether
4 that's an accurate representation of anything other
5 than something off the Internet

6 Q (By Mr Schwab) Okay let me ask you to
7 describe what I have just placed in front of you as
8 Government's Exhibit Number 2

9 A Right I am seeing a picture of a rocky
10 structure

11 Q A rock jutting out of the ocean is that
12 the appropriate description?

13 A That would be an appropriate
14 description yes

15 Q And are you familiar with Rockall?

16 A I have seen pictures of Rockall

17 Q Is this a picture of Rockall?

18 A I can't confirm that no

19 Q Why can't you confirm that? Is it an
20 unclear picture?

21 A The picture is clear but I haven't seen
22 a picture of Rockall that looks like that

23 Q How do the pictures that you have seen
24 differ from that picture?

25 A The pictures that I have seen make

1 Rockall look larger and I have seen pictures with
2 people on Rockall and flags on Rockall and signs or
3 Rockall and so on

4 Q The picture that you are looking at now
5 shows two photos isn't that correct?

6 A Yes

7 Q And does one of them show a flag on
8 Rockall?

9 A Well --

10 MR WALSH Objection he hasn't agreed
11 that it is Rockall

12 A Yes there's what looks like a green
13 cloth in one of the pictures yes

14 Q (By Mr Schwab) A green cloth on a
15 pole?

16 A Yes

17 Q Would you describe that as a flag?

18 A It could be what some people would view
19 as a flag

20 Q Now do you see a shoreline there that
21 you could pull up in a boat on?

22 A I can't answer that question

23 Q Because you don't see a shoreline?

24 A I don't see the complete view of
25 Rockall of whatever this is in this picture so I

1 can t answer the question based on these pictures

2 Q Do you have reason to believe that s rot
3 Rockall is that the --

4 A I sample am rot able to answer ore way
5 or the other whether that is Rockall

6 Q But you have seen pictures of Rockall?

7 A Yes I have

8 MR WALSH Objection asked and
9 answered

10 Q (By Mr Schwab) And they look like
11 this?

12 MR WALSH Objection asked and
13 answered

14 A They do not look particularly like this
15 the pictures I have seen

16 Q (By Mr Schwab) What do the pictures
17 that you have seen look like?

18 A I tried to answer that question
19 previously

20 Q How would you describe it?

21 A How would I describe Rockall?

22 Q Mm-hm

23 A Rockall is a large granite structure
24 sticking out of the ocean

25 Q Okay Are there any other state

1 representatives representatives of states that
2 agree with your position on exclusive economic
3 zones?

4 A China has vigorously objected to Japan's
5 claim of an exclusive economic zone around Okino
6 Torishima

7 Q So that's a conflict between China and
8 Japan?

9 A Conflict over the question of whether
10 Japan is entitled to claim an exclusive economic
11 zone around --

12 Q -- a particular island?

13 A A particular insular feature

14 Q Has China said that they will not do
15 exclusive economic zones around islands that they
16 have that are uninhabited?

17 A China according to one of the more
18 prominent Chinese scholars Ji Guoxing China's
19 position is that the Senkaku Diaoyu Dao Islands
20 between Taiwan and Okinawa are not entitled to
21 generate exclusive economic zones

22 Q Those are conflicted islands?

23 A Yes

24 MR WALSH Excuse me what s a
25 conflicted island?

1 Q (By Mr Schwab) Tell me is that an
2 island that you would describe as in conflict?

3 A Those islands are claimed by Japan
4 China and Taiwan

5 Q So in a situation where the island is
6 claimed by two different people there is a position
7 by China that there shouldn't be an economic zone
8 around it?

9 A That's correct

10 Q How does that support your position?

11 A Sir your question was whether China
12 takes the position that small insular features can
13 not generate exclusive economic zones and I was
14 explaining that they have taken that position on
15 Okino Torishima they have taken that position on
16 the Senkaku Diaoyu Dao Islands and although their
17 position is not clear that seems also to be their
18 position regarding at least some of the Spratly
19 Islands in the South China Sea

20 Q Well we started talking about your
21 research into this area of uninhabited islands in
22 the 80's but you also said that you studied it
23 again with a study group in 1995 what was the
24 nature of that study?

25 A Would you like me to give more answers

1 protests that have been issued by the Eastern
2 Caribbean countries with regard to Aves Island which
3 is a Venezuelan island A V E S bird island which
4 is a Venezuelan island in the northeastern part of
5 the Caribbean I guess you would say

6 Q Now would Venezuela be included on your
7 list of colonial powers that have to be limited on
8 their exclusive economic zones as you testified
9 earlier?

10 A Venezuela has a whole series of complex
11 maritime boundary disputes The one that's most
12 relevant to our current discussion concerns Aves
13 Island and the United States entered into a
14 boundary delimitation with Venezuela in which the
15 United States recognized Aves as having the capacity
16 to generate an extended maritime zone fully as if it
17 were a continental land mass and thus gave up
18 potential ocean space south of Puerto Rico and the
19 US Virgin Islands to Venezuela Other countries
20 east of Aves have protested that and have argued
21 that Aves should not be able to have that capacity
22 to generate an extended maritime zone like an
23 exclusive economic zone

24 Q So is Venezuela on your list of colonial
25 powers that have to be limited for taking EEZs on

1 Q Is that one of those powers that you see
2 that needs to be inhibited when you first became
3 interested in the 1908 s is that one of the places
4 that you think needed to be inhibited?

5 A Well --

6 Q Am I mischaracterizing at all what you
7 said?

8 A Palmyra is an uninhabited island, and so
9 the question of whether Palmyra has the capacity to
10 generate an exclusive economic zone I would say is
11 still in play

12 Q In play but you are not coming to a
13 conclusion one way or another on that? That s --

14 A Are you asking me for my conclusion?

15 Q I am asking you if you have one

16 A I could give you an opinion on Palmyra
17 if you would like one but I haven't previously
18 taken a position on Palmyra to my knowledge

19 Q And then how about Kingman Reef?

20 A Kingman Reef is uninhabitable and I
21 don't think a plausible claim could be made that the
22 United States is entitled to generate an exclusive
23 economic zone around Kingman

24 Q And of course Howland and Baker you
25 have expressed an opinion?

1 the Japanese call Takeshima is very much involved in
2 that dispute

3 Q Dokdo is D O C T O W?

4 A D O K --

5 Q D O K

6 A -- D O

7 Q Dokdo

8 A Dokdo

9 Q Okay

10 A Takeshima is T A K E S H I M A

11 Q Okay

12 A The South China Sea of course is a

13 huge complicated area with Vietnam China

14 Philippines Brunei Malaysia and Taiwan all making

15 claims very much involving uninhabited islands The

16 dispute between Greece and Turkey and the Aegean is

17 very much festering and there are some islands that

18 are uninhabited that are involved in that one The

19 US and Canada has a dispute in the Gulf of Maine

20 over the Machias Seal Island that --

21 Q I think that was in your report as well

22 or did I read that somewhere else? I read that

23 somewhere else That's not in your report

24 A It s an unresolved dispute in any

25 event

1 Q Okay

2 A What else do we have that s been talked
3 about recently? The US ard the Bahamas have a
4 dispute off the coast of Florida Perhaps some
5 uninhabited islands are involved in that Anyway
6 that gives you an idea of some of the ones that are
7 festering

8 Q Okay now how many of these involve
9 excessive claims? Is there a difference between
10 excessive claims and contested areas?

11 A Well certainly in Okino Torishima for
12 instance China accepts that Japan has sovereignty
13 over the little reef system there but argues that
14 Japan has made an excessive claim in claiming a 200
15 mile exclusive economic zone around the reef system

16 Q So there is a difference between an
17 excessive claim and a contested area?

18 A Well I think we would use contested
19 area for a situation where each country makes an
20 overlapping claim so in the East China Sea for
21 instance China makes a claim based on the natural
22 prolongation of the continental shelf Japan makes
23 a claim based on the equidistant or median line
24 principle and their claims overlap so there's a
25 cortested area

1 Q Of all of these that we have described
2 here today how many involve this issue of a rock
3 versus an island?

4 A Well certainly the Black Sea Ukraine
5 Romania one does Snake Island is a rather small
6 feature It can be landed on Nobody has ever
7 lived there historically So Romania's position is
8 that it is a rock which is not entitled to generate
9 a zone and Ukraine's position is that it's an
10 island that can generate a zone

11 Q So the two of those examples are this
12 " rock versus island issue? |

13 A Well more than two but I'm not sure
14 " what your question is |

15 Q I'm asking which of these involve this
16 " rock versus island issue? |

17 MR WALSH I believe that
18 mischaracterizes his testimony When he went over
19 every subject he had mentioned that this issue of
20 rocks might be present in every one of the ones that
21 he mentioned I believe he said that

22 A Yes and I don't know all the details of
23 all of them but certainly in the Dokdo Takeshima
24 issue the rock versus island is there and the
25 Senkaku Diaoyu Dao is there and the Spratlys in the

1 South China Sea it's very much there Aves Island
2 it s certainly there

3 Q (By Mr Schwab' And these are issues
4 between states where they are claiming that it is
5 either a rock or an island?

6 A Yes sir

7 Q Okay Now the 1980's was when you
8 first got interested in this issue Is it because
9 of the fact that it s a contested issue among states
10 and has so many of these contentions and points of
11 conflict is that why it interested you?

12 A Yes

13 Q And then you say you became interested
14 again in '95 you joined a study group?

15 A I maintained an interest in this topic
16 steadily throughout the past 25 years but there was
17 this moment in 1995 when I was asked by the State of
18 Hawaii officials to participate in discussions
19 regarding an initiative that had been taken in
20 Congress to discuss whether seven insular features
21 in the Pacific should be attached to the State of
22 Hawaii

23 Q What was the name of the committee that
24 you were on then or were you on a committee or
25 were you a study group? How would you describe it?

1 Q So an island can be a rock What about
2 if there used to be habitation on that island would
3 that mean that it is not a rock?

4 A In my view sustaining human habitation
5 implies sort of an ongoing capacity, and the best
6 way to determine whether a structure can sustain
7 human habitation is to see whether there is
8 communities of humans living on that structure so
9 the fact that there may sometime in the distant past
10 have been human habitation does not necessarily mean
11 that that structure can sustain human habitation

12 Q So humans can abandon an island and
13 that would make it potentially fall into the
14 definition of a rock?

15 A Yes because they might well have
16 abandoned it because they found that they couldn't
17 survive there that the structure could not sustain
18 them

19 Q Now what if it has an economic life of
20 its own because somebody can use it for something?

21 A Small insular structures that are near
22 larger land areas where people live and are used
23 regularly for fishing operations or perhaps even for
24 just recreation could arguably sustain the capacity
25 to generate a zone because in that situation they

1 sustain human habitation and an economic life of
2 their own even though people aren't literally living
3 on them

4 Q So --

5 A In other words if you can imagine a
6 community living on one island that goes to a nearby
7 island for fishing and/or recreation and thus is
8 actively using that structure and at that point we
9 would see it sort of like an open space in a
10 continental area and thus we might conclude that it
11 has that capacity to generate a zone

12 Q So fishing or recreation Are there any
13 other uses that would qualify so that the island
14 stays an island and doesn't become a rock in your
15 definition?

16 A Well I can't rule out other uses but I
17 think the important thing is that we see a real link
18 between a nearby community

19 Q A real link Is there an unreal link a
20 false link?

21 A Well if we were just somehow trying to
22 generate a zone around the island and something
23 unnatural was happening just for the purposes of
24 getting that zone then I think we would -- we may
25 call that an unreal link to use your term

1 Q So if the island was used with
2 navigational aids would that qualify to keep it an
3 island rather than a rock under your definition?

4 A I don't think a navigational aid alone
5 would be sufficient to

6 Q Why not?

7 A Navigational aid is designed to protect
8 shipping and avoid collision. It would indicate
9 that the structure is a hazard rather than something
10 that is sustaining human habitation and having an
11 economic life of its own

12 Q How about an airstrip would that
13 qualify?

14 A I don't think it would qualify alone by
15 itself no

16 Q How about if it's being used as a
17 refuge?

18 A A wildlife refuge?

19 Q Mm-hm

20 A Well obviously we want to encourage
21 wildlife refuges but the -- and that's an important
22 goal of the international community so we want to
23 encourage countries to support wildlife refuges but
24 I don't see anything in this language that supports
25 the proposition that a wildlife refuge is sufficient

1 to lead to a 200 nautical mile zone around the
2 structure

3 Q And getting back to the language ther
4 is that because it doesn't sustain human habitation
5 or because it doesn't have an economic life of its
6 own?

7 A I'm pausing only because maybe I need a
8 more complete question I guess

9 Q You said a while life refuge wouldn't
10 justify an EEZ --

11 A By itself

12 Q -- under this section and you are
13 basing that on subsection three that a rock which
14 can not sustain human habitation or economic life of
15 their own shall have no exclusive economic zone or
16 continental shelf

17 A Right and a wildlife refuge by itself
18 would not be sufficient to convert a rock into an
19 island that can generate an extended maritime zone

20 Q Does the size of the island matter to
21 you at all in this definition?

22 A I wouldn't say the size is completely
23 irrelevant but I think the size would certainly not
24 be dispositive of the question and simply a large
25 size would not be sufficient in my judgment

1 Q Then let me take the perfect opportunity
2 just to refresh your recollection on Rockall In
3 your report you say it's 14 61 meters by 21 meters
4 Does that refresh your recollection about the size
5 of Rockall?

6 A Yes and I apologize for not having
7 memorized that

8 Q No not at all I just wanted to get
9 that on the record

10 A Could I look at my report?

11 Q Certainly

12 A Right I believe my earlier testimony
13 was 200 meters and it should be 200 feet I was
14 thinking after I said that that I might have
15 misspoken on that So 200 feet in circumference and
16 70 feet high okay

17 MR SCHWAB Let me mark this as
18 Government's Exhibit 5

19 (Deposition Exhibit 5 was marked for
20 identification)

21 Q (By Mr Schwab) Okay I show that to
22 you and what I am attempting to do is find a
23 picture that you do remember as Rockall

24 A Yes I remember seeing this picture

25 Q And that s Rockall Island?

1 A To the best of my knowledge it is I
2 have ne er been there personally but it looks like
3 other pictures I have seen designated as Rockali

4 Q And it literally is a rock?

5 A It's a rocky structure yes

6 Q Is there anything other than rock there
7 that you car see?

8 A Well this picture has some building, it
9 looks like on the top

10 Q But nothing no terrain other than rock?

11 A There are some ledges there that people
12 could cling to I suppose if they wanted to spend
13 the night there

14 Q Might have soil on it?

15 A There could be some grasses and wild
16 flowers Birds might have dropped seeds along the
17 way

18 Q Okay So the size of the island
19 wouldn t matter so it could be a land mass that's
20 large?

21 A Well trat was Judge Vukas view
22 certainly

23 Q Is that your view?

24 A My view is that we should look to the
25 question of habitability and an economic life of its

1 own that s the language in the provision so that
2 doesn t refer to size in any direct way

3 Q Could it apply to a country that is
4 desert and uninhabitable?

5 MR WALSH Calls for speculation

6 MR SCHWAB I am calling for
7 speculation That s what experts are all about

8 A Desert land areas are under the Law of
9 the Sea Convention and entitled to generate zones
10 but if we imagine an entire island that was just
11 desert then I think we would come back to the same
12 question of habitability

13 Q (By Mr Schwab) So not all uninhabited
14 features are considered rocks under your definition?

15 A Can you say that question one more time?

16 Q Not all uninhabited features islands
17 are considered rocks under your definition?

18 A Under this definition an insular
19 structure that can not sustain human habitation or
20 economic life of its own is a rock

21 Q But it's either or? It s either
22 inhabited or some sort of economic life correct?

23 A I don t understard that question

24 Q It s either or it s either inhabited or
25 can sustain econoric life or economic --

1 A Well in my report I explain how it
2 might be more logical to view them as both required

3 Q So an island that is say mined and
4 people are just staying there to do the mining
5 that is not considered - that's considered a rock in
6 your definition?

7 A If there is a short term population
8 there for a short term mission then I don't think
9 most of us would think of that as constituting
10 habitation

11 Q How short is short term?

12 A These are all fact based matters and we
13 haven't got a clear consensus on that matter

14 Q So you are saying we haven't You mean
15 scholars have not --

16 A The international community

17 Q The international community By the
18 international community you mean who? States?

19 A States scholars citizens
20 nongovernmental organizations

21 Q One judge on a 21 panel 21 judge panel
22 that's --

23 A I think you shouldn't easily dismiss
24 this one judge on the panel because he was a person
25 that had been deeply involved in the negotiations

1 is habitability

2 Q So if the people left Pitcairn Island
3 then it would no longer -- it would then be a rock
4 under your definition?

5 A If those people and the other six
6 billion of us decided that none of us wanted to live
7 on Pitcairn then I think it would move into the
8 uninhabitable category yes If nobody wants to
9 live there then it is not habitable because there's
10 lots of people in the world that like to live
11 places and there are a lot of people living in very
12 crowded places so if there is any good place to
13 live we are likely to find people living there

14 Q So it is those places where people prefer
15 not to live that would then potentially fall into a
16 rock category under your interpretation?

17 A Yes sir

18 MR SCHWAB Let me mark this as
19 Government's Exhibit Number 6

20 (Deposition Exhibit 6 was marked for
21 identification

22 Q (By Mr Schwab, This is your expert
23 report Can you identify what I have just placed in
24 front of you?

25 A This is titled as the expert report of

1 Q Now you state in your report on page
2 three that a visitor to Howland in 2000 reported
3 seeing a flat bulldozed plain of coral sand without
4 a single tree is that correct?

5 A Yes sir

6 Q So someone had brought a bulldozer to
7 the island and bulldozed?

8 A I can't say how the flat bulldozed plain
9 came to be I just reported this statement

10 Q How would something become bulldozed if
11 it wasn't done by a bulldozer?

12 A It may well have been done by a
13 bulldozer

14 Q Isn't that --

15 A I have answered --

16 Q -- what you are saying?

17 A I have answered to the best of my
18 abilities

19 Q You were aware when you studied Howland
20 and Baker Island that the island had been inhabited
21 at one time correct?

22 A There was a period in which some young
23 men were sent to these islands in the late 30's
24 early 40's that's correct

25 MR SCHWAB Let's mark for Exhibit 8

1 then a photograph

2 (Deposition Exhibit 8 was marked for
3 identification

4 Q (By Mr Schwab) If I could ask you to
5 look at that? Could you tell where that photograph
6 is from? Is there a stamp that tells you where it
7 is from?

8 A There are two stamps that indicate that
9 they are from the Bishop Museum archives

10 Q And what is that a picture of?

11 A The picture shows four structures on a
12 chunk of land

13 Q And the attached page is an explanation
14 from the Bishop museum What does that say?

15 A It says photo collection Bishop Museum
16 subject Meyerton Baker Island rock wall in
17 foreground was intended to keep waves out March
18 October 1940

19 Q Were you aware at all of what Meyerton
20 is?

21 A I haven t heard the term Meyerton

22 Q Okay

23 MR WALSH Let me just put an objection
24 on the record the document lack of foundation
25 hearsay and not the best evidence

1 MR SCHWAB And let me mark this as
2 Government s Exhibit 9

3 (Deposition Exhibit 9 was marked for
4 identification

5 Q (By Mr Schwab) I will ask you to look
6 at that as well and is that also stamped from
7 Bishop Museum archives?

8 A Yes sir it is

9 Q And what is the picture shown?

10 A The picture shows a barren bleak piece
11 of land with three or four structures a United
12 States flag and a sign that reads Baker Island
13 USA South Seas Meyerton Department of the
14 Interior with a couple of drawings on the sign

15 Q And what does the attached page say?

16 A Photo collection Bishop Museum subject
17 Meyerton the American settlement on Baker Island
18 date 1938

19 MR SCHWAB Okay and let me mark as
20 Government s Exhibit Number 10

21 MR WALSH Let me put my same
22 objections Again it is lack of foundation
23 hearsay There are penciled writings on this
24 document and stamps Not the best evidence

25 (Deposition Exhibit 10 was marked for

1 identification

2 Q (By Mr Schwab Okay and what is
3 marked as Government s Exhibit Number 10 what does
4 that show you?

5 THE WITNESS Do you want to go first
6 this time?

7 MR WALSH I will put my objections in
8 The same objections

9 MR SCHWAB No problem Your
10 objections are noted for all of the --

11 MR WALSH Photographs that are coming

12 MR SCHWAB -- photograph exhibits

13 yes

14 A And your question was?

15 Q (By Mr Schwab) What does that show
16 you?

17 A It's a photograph of five male
18 individuals in front of a building that has a sign
19 on it saying government house Howland I it looks
20 like

21 Q Okay

22 A And then there are pencil marks that
23 say --

24 Q And the attached page description what
25 does that say?

1 A Well the attached page has two more
2 pictures of a very bleak barren piece of land One
3 picture shows a lighthouse or what looks to be a
4 lighthouse and the other picture shows five or six
5 small wooden structures and a lighthouse Do you
6 want me to read the typed or --

7 Q No we are good

8 A You re good

9 MR SCHWAB Government s Exhibit Number
10 11 and your objection is noted

11 (Deposition Exhibit 11 was marked for
12 identification)

13 Q (By Mr Schwab) What does that show
14 you?

15 MR WALSH Same objection

16 Q (By Mr Schwab) Do those purport to be
17 more pictures from Baker Island people doing
18 different activities?

19 A This is a two-page document The first
20 page has four pictures Each picture has a couple
21 of -- one or more males doing different things Do
22 you want me to go into any more detail?

23 Q Is there a picture of a lighthouse being
24 constructed there?

25 A There is a picture of something that

1 looks like it might be intended to be a lighthouse
2 with some males climbing on it ves

3 MR SCHWAB Okay Exhibit 12 and
4 again your objection is noted

5 MR WALSH Same objection
6 (Deposition Exhibit 12 was marked for
7 identification)

8 Q (By Mr Schwab) Okay and what is that
9 if you could describe it?

10 A Exhibit 12 is a two-page document The
11 first page has four pictures There is pencil
12 writing referring to Baker Island Three of the
13 four pictures have two or in one case three males
14 in them and the fourth picture simply shows a
15 structure

16 Q Let me ask you if I could if any of
17 these photos that I have shown you here today have
18 any effect on your opinion that Baker Island is a
19 rock under 121 three?

20 A They do not I am familiar with this
21 episode when the United States sent these young men
22 to Baker and Howland and I think also Jarvis and
23 perhaps other islands as well for the purpose of
24 solidifying the US claim of sovereignty over these
25 islands This was done just prior to World War II

1 at a time of world tension and the islands then
2 played I think a very modest role in World War II

3 MR SCHWAB Mark this as Government's
4 Exhibit 13 and I will let you make your objection

5 MR WALSH Well okay I will make the
6 same objection

7 (Deposition Exhibit 13 was marked for
8 identification)

9 Q (By Mr Schwab) All right let me show
10 you what is marked as Government's Exhibit 13 This
11 is a list from the Internet from the Kamehameha
12 School showing the people that they sent to these
13 different islands to live for a short period of time
14 and a listing of the amount of months that they
15 lived on the islands Have you any familiarity with
16 the project from the school to have people live on
17 these islands including Baker Island?

18 A As I explained I am familiar with this
19 episode where young men were sent down to solidify
20 the US claim of sovereignty over these tiny islets

21 MR WALSH Let me again note my
22 objections

23 MR SCHWAB Absolutely

24 Okay Exhibit 14

25 (Deposition Exhibit 14 was marked for

1 identification)

2 Q (By Mr Schwab) This is what I have
3 marked as Government's Exhibit 14 which is just from
4 the Honolulu Star Bulletin and it is called the
5 boys of the Panala'au?

6 A Panala'au

7 Q Panala'au and are you familiar with the
8 boys of the Panala'au?

9 A I think I answered that question I am
10 familiar with this episode and I am familiar with
11 the purpose and activities that were involved in it

12 Q So you are aware that people did live on
13 the island at one time?

14 A Yes Mr Schwab

15 Q Okay

16 MR WALSH Same objection to that
17 exhibit

18 MR SCHWAB And then I am going to mark
19 this as Exhibit 15

20 (Deposition Exhibit 15 was marked for
21 identification)

22 Q (By Mr Schwab) Can you look at what I
23 have given you as Government's Exhibit 15 and
24 describe that?

25 A Well it's a piece of paper that appears

1 to have been printed on a color printer showing
2 something that must have been found on the Internet
3 and it looks a little bit like the cover of an
4 envelope addressed to a Mr or Ms Hendrick in San
5 Diego and stamped with a US star and a stamp on it
6 that refers to the USS Astoria which must be a
7 ship and it says Baker Island on it and it gives
8 us the date of September 4th 1934

9 Q So in 1934 that's a letter that was
10 sent from Baker Island?

11 A I can't confirm that

12 Q That's what it purports to be by its
13 postal stamp?

14 MR WALSH Objection lack of
15 foundation

16 A I simply can't confirm that

17 Q (By Mr Schwab) You can't What do you
18 make of the postal marking that says Baker Island?

19 A As I testified it was my understanding
20 that the US engaged in activities to firm up its
21 claim to sovereignty over these small Pacific
22 Islands and as a part of that effort sent some young
23 men to have a presence on those islands for several
24 years

25 Q And you are aware of the reason the young

1 men that they - where they came from?

2 A I believe most of them came from Hawaii
3 yes

4 Q From a particular school in Hawaii?

5 A I think they came some of them from
6 Kamehameha Schools yes

7 Q Kamehameha Schools and all of the
8 government exhibits I have just shown you here today
9 have pictures from Howland and Baker people on the
10 island the construction of items on the island
11 none of that would affect your opinion that this is
12 an island that does not deserve an EEZ?

13 A My opinion which has been consistent
14 now in writings for 25 years has been that the
15 proper way of defining and interpreting Article 121
16 three is to draw a distinction between those insular
17 structures that can maintain stable populations of
18 humans and those that can not and I have written
19 that for a stable population of humans we should
20 look for families children being born and raised
21 and we should look for a size of somewhere with at
22 least a minimum of fifty or so

23 This activity was done for a limited
24 purpose and to me the instructive part of it is
25 that for the last 65 years there has been no

1 continued effort by any of the six billion of us on
2 the planet to live on Baker because apparently it is
3 not a habitable place

4 Q And you are aware of course that Baker
5 Island has a beacon on it which you can see the
6 picture of that being constructed?

7 A I am not aware of what is on Baker at the
8 present time

9 Q And you are aware of the runway that was
10 constructed on Howland Island are you not?

11 A I understand a runway was put in during
12 World War II yes or prior to --

13 Q And that was a historic aspect doesn't
14 it?

15 A Some people link Amelia Earhart to
16 Howland yes

17 Q So Amelia Earhart was expected at
18 Howland when she disappeared is that the history as
19 you understand it?

20 A I can't confirm that but I have heard
21 stories along those lines

22 Q So if there were a future use for an
23 island say as aviation is becoming more important
24 and the need for airports and a location such as
25 Howland Island would that affect your opinion at

1 all?

2 A I think if you and your friends and
3 family all moved to Baker Island and lived there for
4 a period of time and have children and
5 grandchildren of course that would force me to
6 rethink my position on this matter --

7 Q But your position has to be at least 50
8 or so?

9 A Well that's not an absolute number
10 but --

11 Q Okay

12 A -- it gives you a sense of what the
13 range should be to show that it's a community

14 Q So there is no absolute number but it
15 would have to be a community of people?

16 A And Pitcairn tends to be 60 or so so I
17 picked 50 just to give a sense that it should be
18 probably more than just one family and something
19 like a small village

20 Q So even though there's an economic
21 benefit being used in the island the fact that it
22 has no population today would have you classify it
23 as a rock under 121 three is that correct?

24 A Again the language is an economic life
25 of its own so to me it's improper to sort of say

1 that the economic value of an exclusive economic
2 zone would be an appropriate economic value. That
3 to me seems inappropriate logic that we need to
4 look at the island in isolation does it have an
5 economic life of its own and only then is it
6 entitled to generate an exclusive economic zone

7 Q So having a runway for airplanes would
8 not be an economic life of its own?

9 A Certainly having an abandoned runway
10 doesn't help us establish that

11 Q Okay and then the beacons you have
12 already testified would not be in your opinion an
13 economic --

14 A No

15 Q -- life of its own because they aid in
16 navigation so they wouldn't be considered --

17 A They help ships avoid bonking into the
18 structure yes

19 Q Didn't they help ships guide themselves
20 into the structure?

21 A Well they could but normally a
22 lighthouse is there to protect you from accidents
23 and sinking

24 Q Or to guide you to the island you know
25 where shore is because of a beacon?

1 A Yes that s possible a beacon could
2 serve that purpose as well

3 Q Okay You talk about Baker and Howland
4 both receiving scant rainfall Is rainfall a factor
5 in whether or not you would consider an island to be
6 a rock under 121 three?

7 A The existence of an actual water source
8 I think is a very important factor so rainfall is
9 linked to water sources so in general that would
10 be a link yes

11 Q So it is a lack of fresh water would
12 make the area unsuitable for humans and that would
13 tend you towards the 121 three interpretation?

14 A A lack of fresh water would be an
15 important factor to limit habitability yes

16 Q And that would apply throughout the
17 Pacific Islands correct not just to Howland and
18 Baker?

19 A I don t understand your question

20 Q Other islands would be affected by that
21 interpretation as well?

22 A It s meant to be a generalizable
23 interpretation yes

24 Q Have you ever studied what effect it
25 would have on Pacific island nations if your

1 interpretation were to be accepted by states or
2 courts?

3 A My interpretation is based on my study
4 of history and my understanding of the purpose of
5 the provision and it will affect different
6 countries in different ways I understand that but
7 no I haven't --

8 Q Looked at the impact of --

9 A I haven't put together a score card on
10 winners and losers in this matter

11 Q You think there would be losers
12 somewhere in the Pacific island nations?

13 A I can't give a broad general answer to
14 that but --

15 Q Specifically do you think the Northern
16 Marianas Islands would lose jurisdictions?

17 A Well the Northern Mariana Islands have
18 uninhabited islands so --

19 Q And do you think that the Federated
20 States of Micronesia would lose jurisdictions?

21 A I really can't give a broad answer to
22 that but I suppose that it's possible that there
23 might be some of their claims that could be
24 challenged, yes

25 Q And the Marshall Islands?

1 A It's possible that some of their claims
2 could be challenged over time yes

3 Q So all of these island nations would
4 lose potentially possibly lose jurisdiction under
5 your definition as well?

6 A It's possible yes

7 Q As far as you know no state or court
8 has ever accepted your definition?

9 A I have mentioned the Nicaragua Honduras
10 case which is the absolute most recent
11 International Court of Justice case where both
12 states accepted -- it is not my view but it's the
13 view that certain insular structures can not
14 generate exclusive economic zones and I stand
15 behind that as a very good recent state practice
16 that supports the position that I have been trying
17 to articulate this morning

18 Q But you have also stated that that only
19 occurs where two states are in conflict?

20 A No sir I did not say that

21 Q Okay Is there an example of where two
22 states are not in conflict when that occurs?

23 A Where a country has for -

24 Q Has decided to give up --

25 A Yes

1 Q And I don't mean to be abstract but you
2 are promoting the increase of shared areas is that
3 correct?

4 A I don't think of this as a personal
5 mission but I do think that one of the underlying
6 goals of the effort that produced the Law of the Sea
7 Convention was to recognize the opportunities that
8 we have in the oceans to help the developing world
9 and to bridge the gap between the rich and the poor
10 and to use the resources of the areas of the ocean
11 beyond national jurisdiction to benefit the least
12 well off of us on the planet

13 Q And this is the case even though
14 there is a potential as you said that this would
15 deny jurisdiction to some of the smaller island
16 nations throughout the Pacific including Hawaii?

17 MR WALSH Lack of foundation

18 Q (By Mr Schwab) Am I lacking
19 foundation? Isn't that true what you were saying
20 earlier?

21 A As I said I suppose there will be
22 winners and losers but in the long run we will all
23 be winners if we work together to manage the ocean
24 resources properly and fairly and my hope is that
25 the small nations of the Pacific wind up as being

1 have the first question on this case of whether or
2 not Baker --

3 Q Isn't that why we are even -

4 A If I could finish? Baker and Howland
5 can generate an exclusive economic zone? If they
6 can then we would have to delimit the boundary with
7 its neighbor and what role Baker and Howland would
8 play in that delimitation would be up to grabs in
9 that negotiation

10 Q The reason you are giving us Article 83
11 cases and you know cases that have to do with
12 these other sections that do not cite or rely on 121
13 three is because they are different right? The
14 only one that deals with 121 three is Rockall
15 Island right and that's a 200 feet by 70 feet
16 thumb of rock that sticks up in the ocean as opposed
17 to these islands?

18 A China has been very clear that it
19 objects to Japan's claim for an exclusive economic
20 zone around Okino Torishima based on Article 121
21 three

22 Q And yet China has operated by using its
23 uninhabited islands as part of its baseline?

24 A Again different criteria govern that

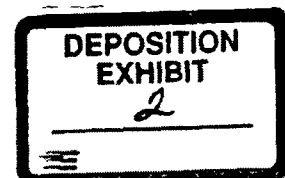
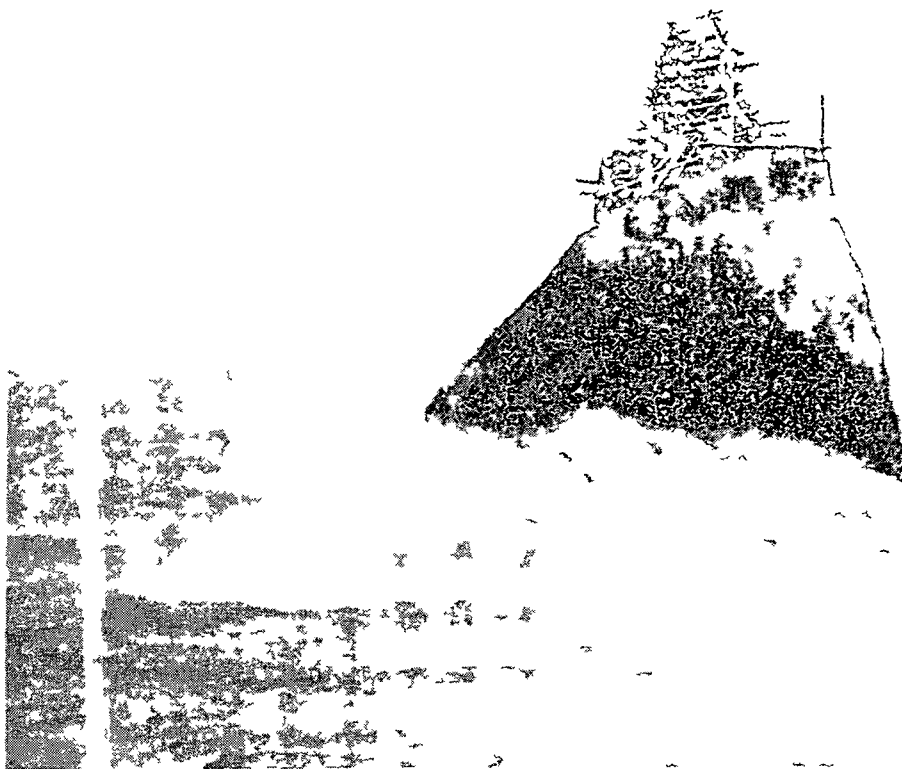
25 Q So it really is up in the air isn't it?

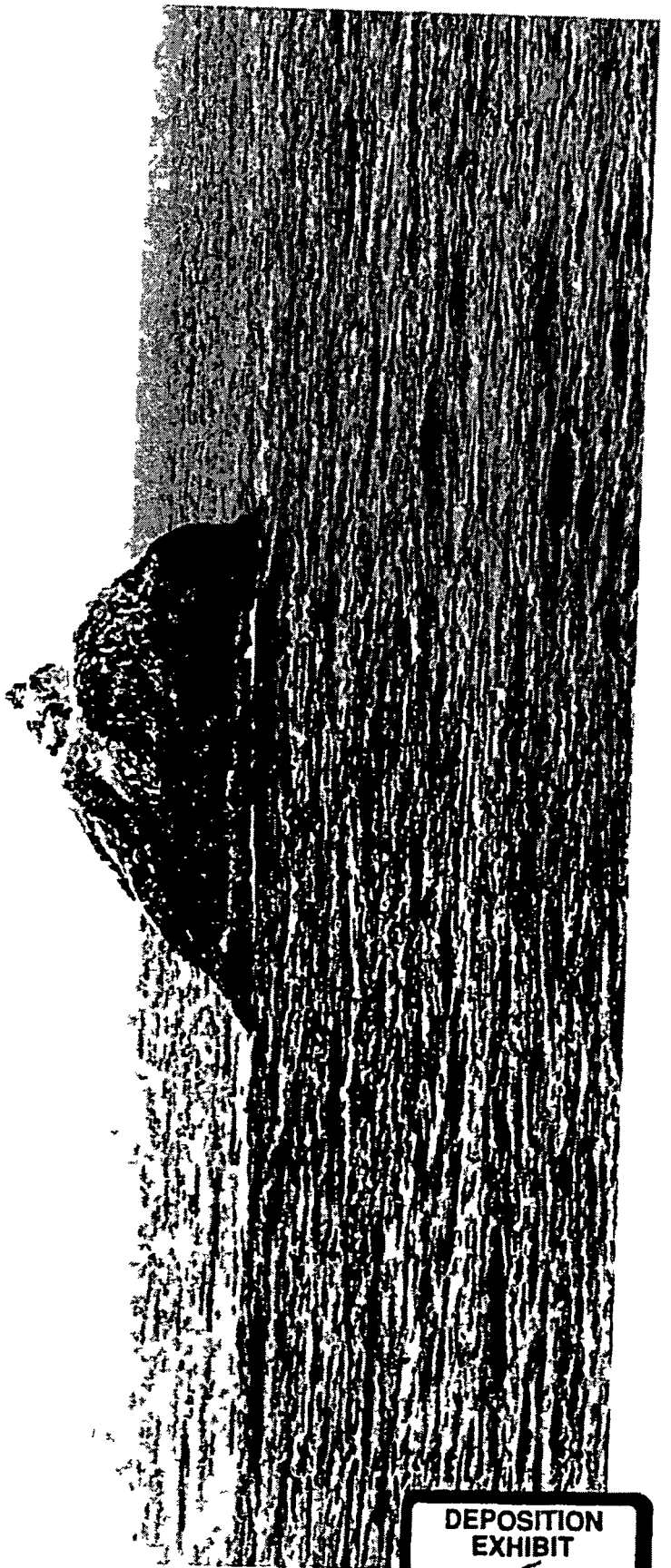
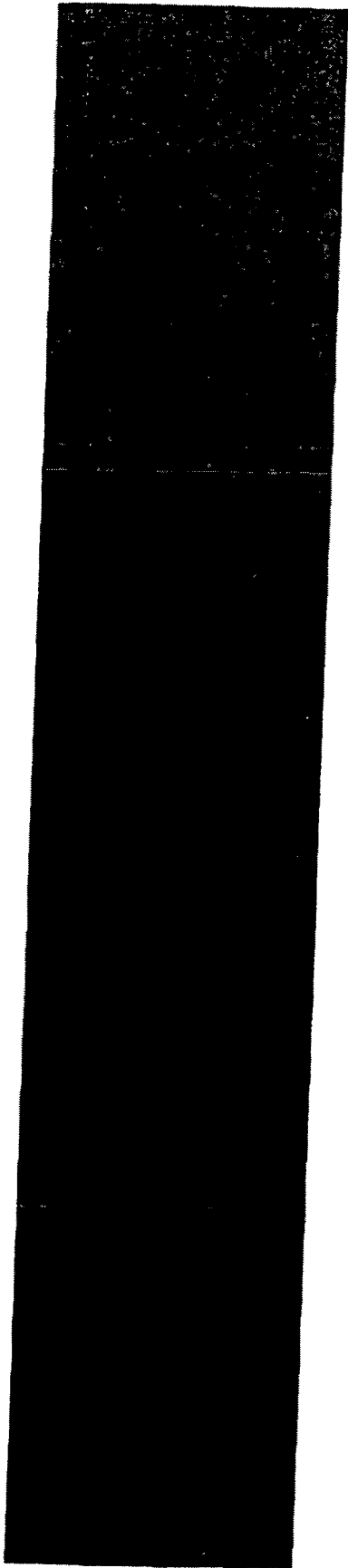
Subject rockall photos

Date Mon 29 Oct 2007 15 38 07 0700

From Paul Ortiz <Paul.Ortiz@noaa.gov>

To Schwab Mikel (USAGI) <Mikel.Schwab@usdoj.gov> Alexa Cole <Alexa.Cole@noaa.gov>
Mark Simonoff <SimonoffMA@state.gov>





DEPOSITION
EXHIBIT

5

Telegram UNCLASSIFIED SUVA MARSHALLS 201 Telegram
VZCZCXRO3868 00000121
PP RUEH MJ
DE RUEHSV #0121 0521348
ZNR UUUUU ZZH
P 211348Z FEB 07
FM AMEMBASSY SUVA
TO RUEHC/SECSTATE WASHDC PRIORITY 3805
RUWDQAA/CCGDFOURTEEN HONOLULU HI PRIORITY
RUEAWJB/DEPT OF JUSTICE WASHDC
RUCPDC/USDOC WASHDC
RUEH MJ/AMEMBASSY MAJURO 0630
BT
UNCLAS SUVA 000121

COMMERCE FOR NOAA GCEL/SW-PI

E O 12958 N/A
TAGS EFIS PHSA PBTS KR FQ HQ RM
SUBJECT KIRIBATI F/V MARSHALLS 201 WAS OVER THE LINE

REF REO MURPHY-AUSA SCHWAB TELCONS AND E-MAILS OF 02/21/07 AND PREVIOUS

1 Kiribati Ministry of Foreign Affairs Permanent Secretary Elliot Ali (the highest ranking career official in the ministry) told embassy Suva on February 22 2007 that the government of Kiribati would not/not make a submission in U S court proceedings against the F/V MARSHALLS 201 (Civil Case 06-00030) in support of the defendant's claim to have been fishing in Kiribati's EEZ. Ali's comments came after reviewing the complaint filed with the U S District Court for Guam and after consulting with the Kiribati Ministry of Fisheries and Marine Resources Development (MFMRD).

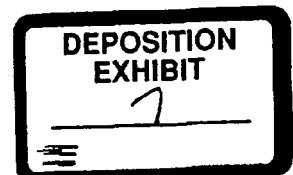
2 On February 19 2007 MFMRD Vessel Monitoring System (VMS) Officer Ioneba Temoai provided us with an electronic snapshot of F/V MARSHALLS 201's VMS track for the period August 2006-February 2007. This track first records the vessel as being inside Kiribati's (Phoenix Islands) EEZ at 1 28 A M on September 8 2006 having crossed from the U S (Howland and Baker) EEZ and last records it in Kiribati's EEZ at 9 38 P M on September 8 headed back into the U S EEZ. Ioneba's message which we have forwarded to the U S Attorney's office in Guam says that the snapshot indicates that the vessel was not in Kiribati waters during the incident. Foreign Affairs Ali reiterated that position to us.

3 Background According to information provided by the U S Attorney's office in Guam (ref) The U S Coast Guard arrested the RMI-flagged F/V MARSHALLS 201 on 9 September 2006 after it was observed fishing within the U S EEZ around Howland and Baker Islands on 7 and 9 September. The U S Attorney's office via NOAA and the Department (OES/OMC) asked for post's assistance in determining if the government of Kiribati planned to support the defense assertion that the locations where the F/V MARSHALLS 201 was observed fishing were in fact within Kiribati's claimed EEZ. The bottom line is that it does not and has in fact reached the opposite conclusion that the vessel was in U S waters as alleged in the complaint.

Dinger

BT

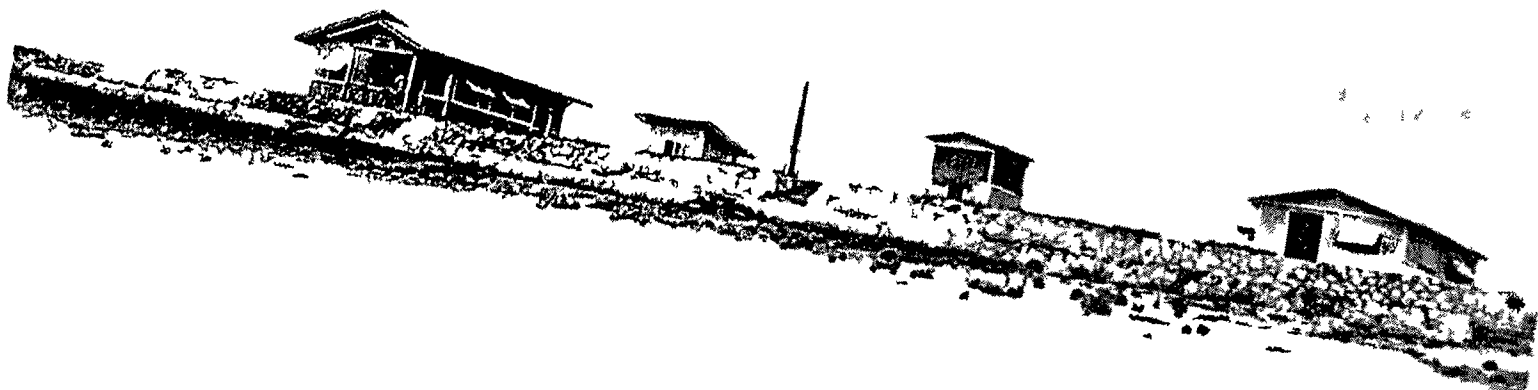
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Meyerton, Baker Island.
(Rock wall in foreground was intended to
keep waves out.) Mar Oct 1940

CP 126,478

Pac. Islands Baker Island.

TL 2002 042

TL 2002. 042

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Colonists with military officer, Howland Is 1937

GOVERNMENT HOUSE



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CP 101 464

Howland Is folder

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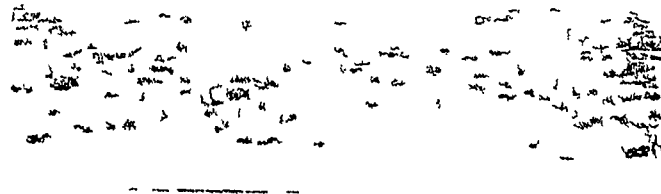
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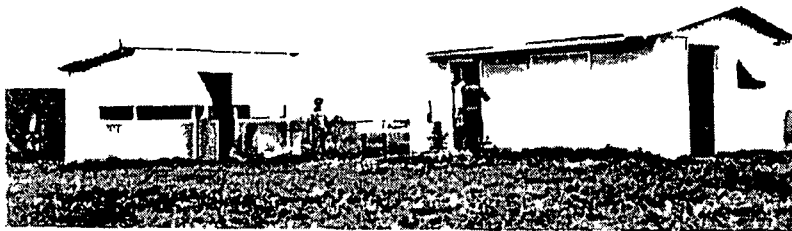
A IX HOWLAND ISLAND 14 11

Howland Island Equatorial Islands 1938
Photos by Samuel H. Lamb Hawaii National Park
Upper left Amelia Earhart light looking west
with U S Coast Guard Taney in distance
Lower right Lighthouse and camp houses



CP 11

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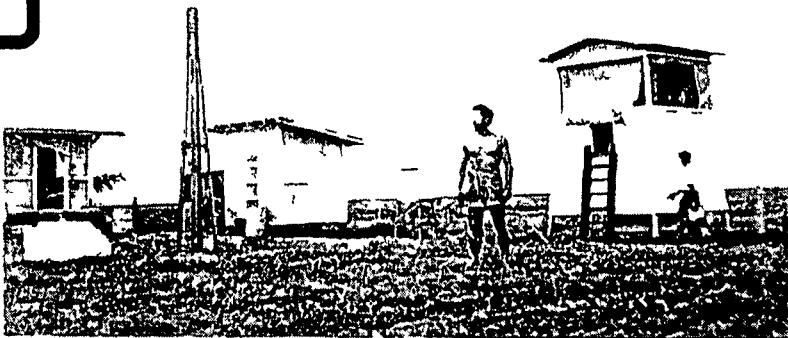


PAC Taken 7/1/11 CP 126, 111

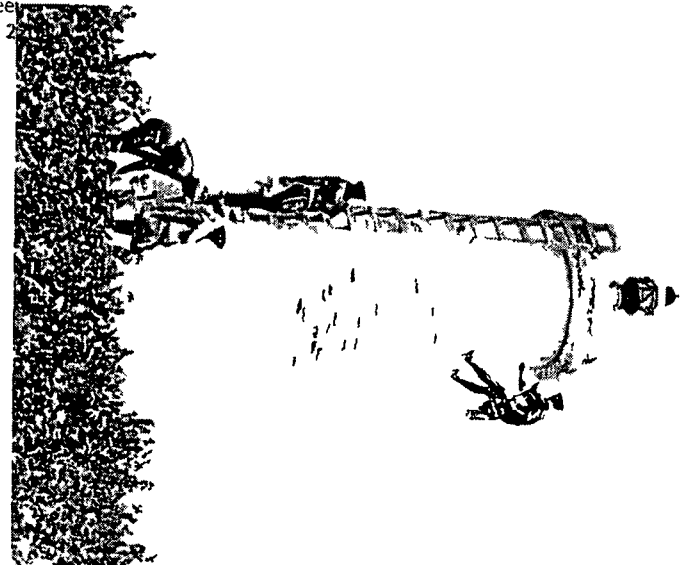


PAC Taken 7/1/11 CP 126, 483

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PAC Taken 7/1/11 CP 126, 417



PAC Taken 7/1/11 CP 126, 493

Colonists were forbidden to have boats, so this canoe had to be hidden when the Coast Guard's USS Taney visited on 1942 it was used to evacuate colonists when rescued by US Navy

Water shed (far left), Kitchen,
and food storage building at Meyerton,
Baker Island Mar-Oct 1940

CP 126,479

Pac Baker Island

TL 2002 042

Woodie Phillips

TL 2002 042

John Toomey and Hans Jensen burying
their canoe in the sand to hide it, Baker
Island ^{July} ~~Mar-Oct~~ 1940

CP 126,483

Pac Baker Island

TL 2002 042

Woodie Phillips

TL 2002 042

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Government House (far left),
radio shack, and weather building (w/ Woodie
Phillips), Baker Island Mar-Oct 1940

CP 126,487

Pac Baker Island

TL 2002 042

TL 2002 042

US colonists whitewashing lighthouse
on Baker Is. Woodie Phillips (top), Joe Keppel,
Carl Jensen (left), John Toomey ^(right) Mar-Oct 1940

CP 126,493

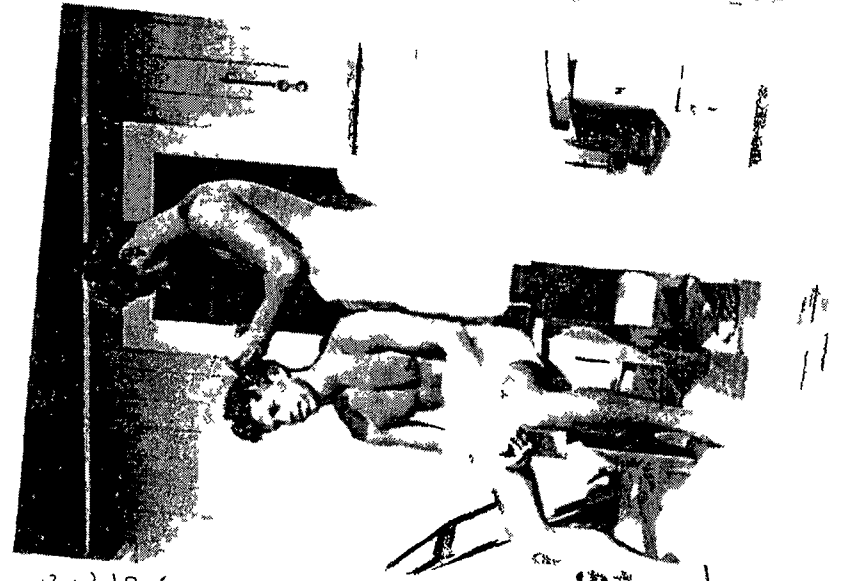
Pac Baker Island

TL 2002 042

TL 2002 042



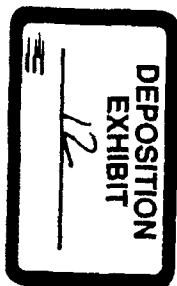
Pacific Water Island CP 126, 701



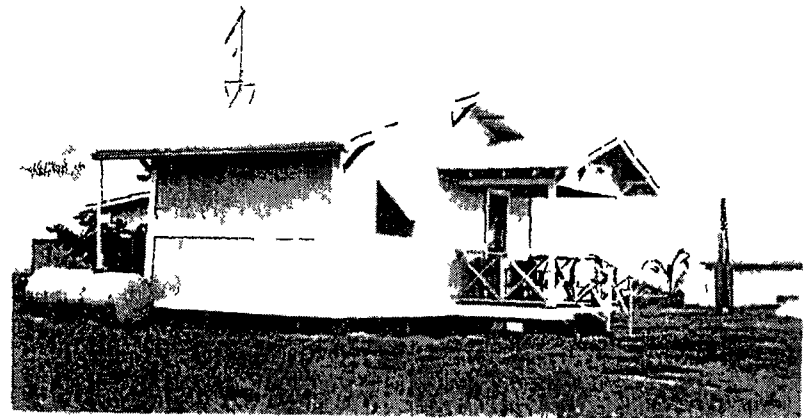
CP 126, 430 Pac Water Island

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Pac Water Island
CP 126, 472



CP 126, 471
1, 4, 6

Melvin Paao cutting Woodie
Phillips' hair on Baker Island
Mar - Oct 1940

CP 126, 470

Pac Baker Island

TL 2002 042

TL 2002 042
Woodie Phillips had to pay Melvin five
for 1 feathers from the tropic bird for
this haircut (original caption)

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Melvin Paao, Woodie Phillips,
+ John Toomey on Baker Island
Mar Oct 1940
Pac Baker Island
TL 2002 042
TL 2002 042

Hans Jensen and John Toomey
holding shark caught at Baker
Island
Mar Oct 1940
Pac Baker Island
TL 2002 042
Woodie Phillips
TL 2002 042

Government Building at
Meyerton, Baker Island
Mar - Oct 1940
CP 126, 470
Pac Baker Island
TL 2002 042
Woodie Phillips
TL 2002 042



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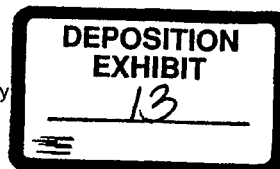
Home >> Other Historical Information >> Hui Panalā'au >> Membership

>> Membership

Membership information is from a typewritten roster

Codes used

Names in bold = Hui O Panalā'au members primarily Kamehameha Schools alumni
 Number=cruise expedition number about 4 months on an island The more numbers the longer the stay
 s=spare person on the cruise expedition to replace anyone
 L=Leader of the island expedition group
italics=commanding officer army personnel teacher (Dr Mitchell)



Ah Nee Charley	Faufata Folinga 3 7	Kinney James 12L 13L 15L 16L 17L 18L 19L	Rahe Bernard 15s 16 17
Ahia Charley 7 8 10L 11L	Fialkowski Henry 14 15L	Leong Ah Kin 6 7 9 10 11 13 14	Rankin Ernest W 21
Ahia Henry B 1 2L 3L 5L	Hall Bernard 23 24	Lum, Harold 7	Roberts John 13 14
Akana Albert Jr 7L 8L 9L 11L 12L	Hailii Jacob 3 4 6 7 10s 12 13	Lum Kum 9s	Roberts Oliver 17s 18 19 20
Akana Bernard 14L 15L	Harbottle Issac Jr 16	Lum Paul Yat 7 8 10	Ruddles James 19s
Akana George 13 15L	Harris Arthur 2s	Lum Yau Pai 6 8 9 10 12	Riley James 22 23 24
Akana John	Hartwell David 18 19 20 21 23 24	Lum King, Kenneth 11 12	Robinson Alexander 16 17
Akana Lewellyn 15s	Henderson Waldron 18 19 20 21	Lee Francis 14L 15 16	Smith Henry 18 19 20 21
Akana Theodore 10 11L 12L	Hooper Herbert 3 4L	Lee Frederick 5 13 14 16	Sproat Manuel 6
Anakalea, Joe 4L 6 7 10 11 12	Hutchinson William 15	Lee Henry Kong 13 14 15 17 18 19L 20L 21L 22	Stillman Francis 14 15 16 17L 19
Anahu Bill 2	Jensen Karl 18s 19 20 21 22 23 24	Lieson Robert W 18 19 20	Stillman George 20
Au Charles 16 17	Jensen Hans 16 17 18 21 22L	Mackellar Ian 15 16 17 18	Suares Louis 15L 16L 17L 18L 19L 20L
Beatty Rupert 15 16	Kaahea Henry 12 13	Mahikia Henry 4	Stein Charles 16 17 18L 19L
Bederman Thomas 16 17 19 21L 22L 23L 24L	Kahalewai Sam 13 15 16	Mattson Elvin K 22 23 24	Stein James
Bell Kenneth 5	Kahalewai Carl 10s 13	Markham Stewart 5	Tavares William 7 8 9 11 12 14L 15
Blake Hartwell 5	Kahanu George 4s 5	McCorriston Edward Mike 12 13L 15 18L 19L 20L 22L	Toomey Daniel K 1 2 3
Boyd Andrew 14 15	Kahapea Alexander 4	McCorriston Thomas 16L	Toomey John 18 19 20
Brahn J F 23 24	Kahapea William 19s	Medeiros Henry 12 13	Toomey William 2
Braun Charles 14L	Kaina William 1 2 3 5 6 8 9 10L	Makua Blue 22 23 24	Towill Henslee
Braun Clarence 13	Kalama David 17 18 19 20	<i>Meyer Col H A</i> 1 2 3 4 5	Victor Gabriel 7 8 9
Burke Eugene 7 8 9 11 12 14 15L	Kalama Samuel 2	<i>Mitchell Donald D</i>	Waiwairole Luther 4 14 15

Burke Walter 16s 22L 23L 24L	Kalama Solomon 1 4 6L 7 10	<i>Norwood Bill</i>	West George 2
Bush Harry 13s	Kamakaiwi James 1 2L 3L 5L 7L 8L 9L 12L 13L 14L	Ohumukini Henry 4	Whaley Richard 22 23 killed
<i>Bryan Edwin</i>	Kaninau Charles 5s 11 12	Opiopio Killarney 1 2 3 5 6L	Wilhelm Fred 14 16 17
Calley C D Jr 14	Kauahikaua Archie 3 4	Pacquette Maurice 16 17L	Williamson Elmer 2s 10 11
Carroll James 4s	Kaulu Albert 21 22	Phillips Manuel 16 21	Wong Alexander 12 13L 14
Chang Herbert 11 12 13 13	Keliuhananui Joseph 18s 19 20 21 22 23 killed	Phillips Paul 22 23 24	Wood Joshua 13
Ching Archie 2	<i>Kenner Betty</i>	Phillips Woodrow 18 19	Whaley Bill
Ching Lawrence 14 15 17 18 19 20	Kepoo Joseph 19 20 21 22 23 24	Paoa Melvin 14 15 16 18 20s 22s	Yomes William 4 6
Cockett Frank 2	Kilbey John C 21 22	Pea Aki Kini Levi 5 9 10 14 15	Young Edward 3 4L 5 6 8 9
Cockett Herbert 5s	Kim Bak Sung 8 9	Pea William 16 17 18 20s 21	Zagara D P 18 19 21
Coyle James 23 24	Kim Harold 12L 13L 16L 17L 18L	Piianaia Abraham 1 2L 3L 5L 6L 16passenger	
Crowden Lawrence 15	Kim Joseph 4 6 8L 9L 10L	Pires Manuel 12 13 14	
<i>Dippen Clyde B</i>	Kim Victor	Renken E H 22	
<i>Fasik Theodore</i>	Knell Henry K 21	Pease James 23 24	

Expedition information and the cruise roster are from *Panala au Memors* by E H Bryan Pacific Scientific Information Center Bernice P Bishop Museum 1974 pages 224 229 There are claims to accuracy

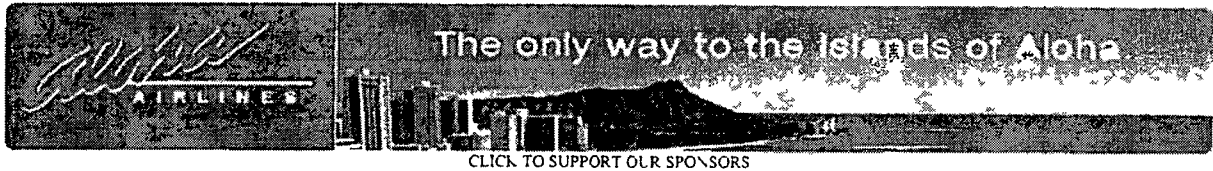
Images of the cruise roster [Cruise 1 4](#) | [Cruise 5 8](#) | [Cruise 9 12](#) | [Cruise 13 16](#) | [Cruise 17 20](#) | [Cruise 21 24](#) |

[Where and why are you going?](#) | [Who went first?](#) | [What is Hui Panala au?](#) | [Pioneering on Jarvis](#) by George West KSB 35 | [1942, the bitter end](#)

[Hui Panala au remembered, 2002 exhibit](#) | [2002 reception](#)

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Starbulletin.com

Sunday April 28 2002



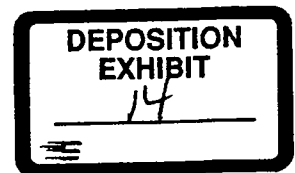
BURL BURLINGAME ARCHIVE

Kamehameha students wave goodbye as they're left behind on Jarvis island in the South Pacific. They would be left there for months.

BOYS OF THE PANALA'AU



During the opening moves



of the Pacific War, dozens of Kamehameha students were rushed into the breach

First of two parts

Bishop Museum exhibit

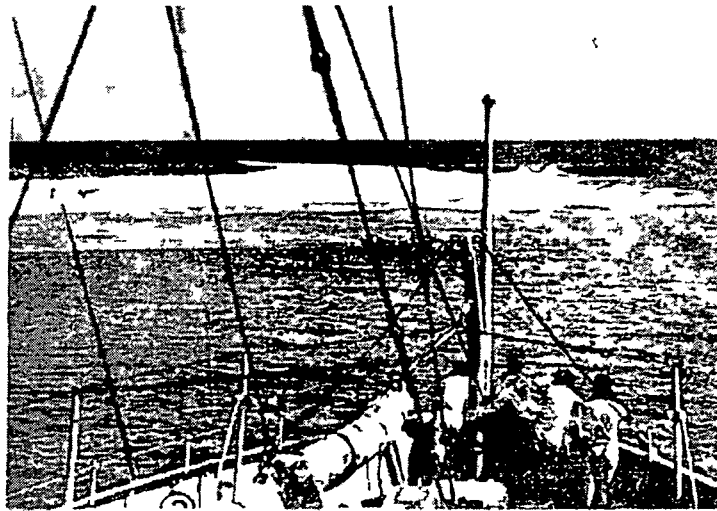
By Burl Burlingame
bburlingame@starbulletin.com

Immediately following the attack on Pearl Harbor on Dec 7 1941 the Imperial Navy's submarines RO 13 RO 64 and RO 68 used their deck guns to shoot up enemy flying boat installations on Howland and Baker islands near the equator south of Hawaii

What they actually shot at were shacks manned by Hawaiian teenagers there because of a bizarre territorial dispute that had erupted six years earlier

Pan American Airlines had plans to pioneer air travel across the Pacific and in 1935 came to an understanding with the U S government It would establish refueling bases on remote atolls for its short legged flying boats with help from the U S Navy The Navy agreed The agreement gave it an excuse to establish hegemony over far flung areas of the Pacific a concept essential for countering suspected Japanese buildups in the mandated islands

Bill Miller director of the Bureau of Air Commerce a single desk within the Department of the Interior came up with the idea of colonizing uninhabited atolls known as the Equatorial Line Islands sun blasted guano heaps called Jarvis Baker and Howland The islands had been claimed by the United States according the Guano Act of 1856 and had been steadily mined of bird droppings for 20 years Phosphates gleaned from the droppings were turned into explosives Americans abandoned the islands in 1877 and the British briefly inhabited them before they too left them to the seabirds



The Coast Guard cutter Itasca approaches Baker Island

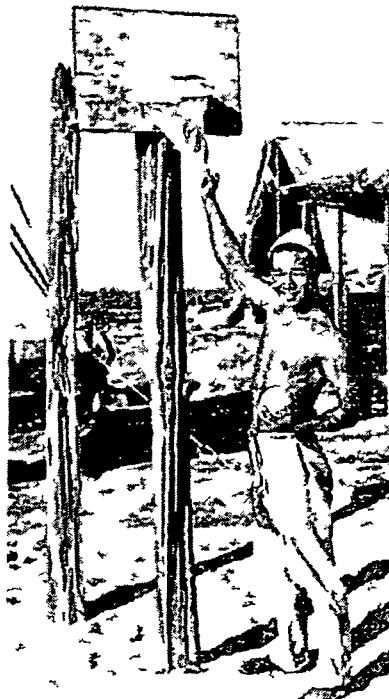
By the 1930s both countries were competing for air routes and the Equatorials almost halfway between the United States and Australia once again looked promising. In Hawaii Miller sprang the colonization idea on Albert Judd, a trustee of Bishop Estate. Judd suggested that boys from Kamehameha Schools would be ideal candidates for settlers.

The Hawaiian background of these boys made them excellent pioneer material, claimed Judd. He pointed out that they were used to hot weather and living off the sea and were disciplined by years at a private school in which ROTC was a requirement. Miller was sold and the operation began in 1935.

England got wind of the plan and rushed her own settlers to the islands, using New Zealand as a stand-in. Lt. Harold A. Meyer of the 19th Infantry, who advised Miller on military aspects of the settlement, made the extraordinary step of telephoning Washington directly from Schofield Barracks. In a two-hour phone call Meyer begged for swift action.

Meyer was placed in charge. Within the day, March 20, 1935, the Coast Guard cutter Itasca was outfitted with supplies and Hawaiian settlers and raced off for the Equatorials. Lt. Cmdr. Frank Kenner, skipper of Itasca, later recalled that the little cutter never made better speed.

The Hawaiians had no clue as to their destination. Nor did the dozen or so soldiers who accompanied them. They had been told simply that it was a security matter. Despite a scare when the ship spotted another vessel and a brief stop at Palmyra atoll to dig up some palm trees for transplanting, the Hawaiians and the soldiers managed to raise the American flag first on the contested atolls.



BURL BURLINGAME ARCHIVE
The boys on Baker Island used scraps of driftwood and a crab net

to build a basketball hoop with a
softball substituting as the
basketball

Every six months or so thereafter depending on the availability of Itasca four boys were deposited on each of the three islands. By the time of the Pearl Harbor attack some 135 Hawaiian teens had participated in the settlement.

When we were invited to participate there was a rush of applicants recalled Abraham Pūanaia one of the first recruited. They only wanted graduates and for boys right out of high school at the height of the Depression the \$3 a day they paid was good money. It was more than the salary of the soldiers who were rotated off the islands after a few months leaving the boys alone.

At first the Hawaiians lived in pup tents eventually graduating to wooden shacks dubbed Government Houses which were open on the sides to let the cool night breezes blow through. All fresh water had to be brought to the islands. The 50 gallon water drums were too heavy to boat to the shore so each was dumped over the side of the supply ship and allowed to drift ashore. If the drums landed on the wrong side of the island the boys walked across the island to get a drink. Whenever it rained open containers on the island were set out.

Jarvis Island nearly 1 000 miles east of Baker and Howland had a ghost town still standing testimony to American and British guano miners of the previous century. A 25 foot high sign still read The Pacific Phosphate Company of London and Melbourne. On the beach was the wreck of the barkentine Amaranth which provided lumber for furniture shacks and surfboards.

The settlers main tasks were logging hourly weather reports clearing land for a runway and servicing a small lighthouse. They also collected wildlife samples for the Bishop Museum of Honolulu. Otherwise it was very much a Robinson Crusoe existence on the islands which rose barely a dozen feet above the sea. Responsibility for the project was transferred to the Department of the Interior. Meyer's involvement was remembered in a billboard sized sign which declared Baker's few buildings to be the town of Meyerton.

In the opening days of 1937 Howland Island was suddenly taken over by Navy engineers who put in a short airstrip. The runway was built in anticipation of Amelia Earhart's planned round the world flight. When Earhart cracked up her Lockheed on the runway at Luke Field in Pearl Harbor while taking off for Howland the flight was rescheduled for the summer.

Earhart next tried to fly around the world in the opposite direction. On the leg between Lae Papua New Guinea and Howland her aircraft disappeared the last radio signals being picked up by Itasca which had paused along her route to give bearings. Earhart and her aircraft vanished despite a massive Navy search. A shower and private bedroom the Hawaiians had built for Earhart went unused. They grieved for her and built a 20 foot sandstone monument which they called the Amelia Earhart Lighthouse.

Things were quiet for the next few years marred only by the death of a colonist in 1938 of peritonitis brought on by appendicitis. Coast Guard cutter Taney traveled 1 310 miles at full speed to save the boy but arrived too late.

Canton and Enderbury islands were added to the program the same year and were the subject of an exchange of notes between the United States and Great Britain in 1939 the upshot being an agreement to joint administration for at least 50 years after which the agreement could be extended.

indefinitely Each government was to be represented by an official and the islands were to be available for communications and airports for international aviation but only of American or British empire airlines

Similar circumstances prevailed at Christmas Island under the administration of the British high commissioner of the Pacific headquartered in Suva Fiji America claimed a seaplane base there as both countries claimed sovereignty based on occupancy Britain however controlled the island from the end of World War I to 1941 Johnston Island actually a string of islets that were technically part of the Hawaiian Sea Frontier was under sole jurisdiction of the United States All the islands were prized solely for their location

The Kamehameha students serviced the islands meager facilities and spent the rest of their days fishing and working on their tans Lobster every day which we ate raw said Piiianaia And the island had these big rats which ate the pili grass Vegetarians We used to catch them and roast them for red meat They were delicious!

We were paid our salary in a lump sum when we went back to Honolulu and it was quite a bit of money We let our hair and beards grow long it made us feel like explorers But as soon as we went home we hit the barber shop

At night the bowl of the universe blazed above the isolated atolls Falling stars were so bright they d cast shadows One night the waters roiled with hundreds of porpoises a pod that seemed to stretch to the horizon Some evenings were reserved for ghost stories punctuated by the sound of birds crying eerily in the darkness

There was magic there

Tomorrow A rescue mission to the South Seas

Portions of this story are excerpted from Advance Force Pearl Harbor by Burl Burlingame Naval Institute Press 2002

[BACK TO TOP](#)

Panala'au exhibit

The Bishop Museum will present The Panala au Years Hawaiian Colonists of the South Seas 1935 1942 running May 18 through June 16 The museum designed traveling exhibit tells how young Hawaiian men occupied remote uninhabited islands in the equatorial Pacific The exhibit includes oral histories photographs artifacts and programs Information 847 3511

[E mail to Editorial Editor](#)

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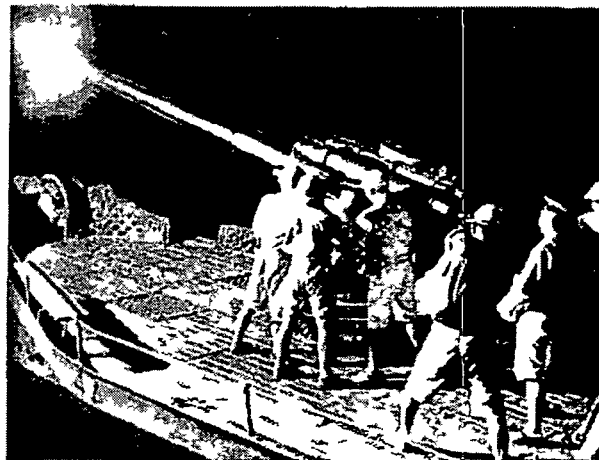
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Monday April 29 2002



BURL BURLINGAME AIRCHIVE

A Japanese submarine of the type that attacked the Baker and Howland islands fired its large deck gun in this Japanese propaganda image

Boys of the Panala'au

Setting the scene Teenage boys were recruited from Kamehameha Schools in the late 1930s to man remote outposts in the South Pacific establishing American possession of islands that might become valuable in the event of a Pacific war After the attack on Pearl Harbor the Japanese Imperial Navy began to bombard the islands

SECOND OF TWO PARTS

By Burl Burlingame
bburlingame@starbulletin.com

Shortly before the outbreak of the Pacific war Abraham Pūanaia was back for a second tour manning the windswept U S outpost on Jarvis Island. One morning he smelled something in the wind. What is that? he said, and the boys stood around sniffing.

Smells like teriyaki! joked one, but to Pūanaia it did smell like Japanese cooking. Soon they saw a gray warship pull up alongside the island. Pūanaia described it as looking like a cross between a destroyer and a freighter, probably a seaplane tender, with the flag of Japan on her stern. The ship put over a launch, which began pulling for shore. The boys decided that the ship couldn't see their shack, called a Government House, very well, so they ran up a large American flag on a pole. Immediately, the launch turned around and went back to the ship, and the Imperial Navy hastily departed the Equatorials.

The Japanese didn't forget about the strategic islands. In December 1941, the boys on Baker Island were Walter Burke, Blue Makua, James Coyle and James Pease. On Howland Island, the colonists were Richard Whaley, Joe Keliūhahanui, Thomas Bederman and Elvin Matson. By then, too far from established flying routes, Jarvis Island had been abandoned.

Panala'au exhibit

The Bishop Museum will present "The Panala'au Years: Hawaiian Colonists of the South Seas 1935-1942," running May 18 through June 16. The museum designed traveling exhibit tells how young Hawaiian men occupied remote uninhabited islands in the equatorial Pacific. The exhibit includes oral histories, photographs, artifacts and programs. Information: 847-3511.

On the morning of Dec. 8, 1941, Burke went outside to raise the American flag and saw a Japanese RO boat just offshore, ungainly in the water. The submarine fired a round and ripped off the top of the Government House. Burke dashed inside and told the dazed colonists that they'd better skeedaddle out of there. The four ran across the island in record time and sought shelter by digging foxholes. Burke ordered the others to disperse across the island so that a single shell wouldn't get them all. The RO boat walked shells across the island, methodically demolishing the building and other facilities, including the light station they had dedicated to the lost Amelia Earhart.

That night, the boys went back to survey the wreckage. Pieces of tin were scattered from the Government House roof, which they used as sunshades the next day. At noon, a four-engine H6K Mavis flying boat passed over the island and let go a salvo of bombs.

The boys piled brush atop their foxholes for camouflage. The bomber came back nearly every day from its base in the Marianas or Marshalls, gutting the atoll with explosives. Little of the food was saved, and rats got into the rest, but there was a little coffee and palolo leaves to chew on, and the ocean provided fish and squid. The U.S. flag that the boys had never managed to raise on the morning of Dec. 8 was wrapped in a gunny sack and buried, marked by a cairn of stones.

They settled in to wait cut off from the rest of the world Christmas dinner was lobster under a full moon and carols into the dawn They kept a low profile going to ground when a Japanese submarine or destroyer came by After weeks of bombing they expected the Japanese to land any moment

Imperial Navy submarine I 74 spied on Howland Island between Dec 23 and 25 and its crew mistakenly thought it recognized installations for ships

At Baker Island a warship showed up on Jan 28 The teenage colonists hid in their foxholes and watched the gray destroyer put over a boat which began pulling for shore Oh boy we've had it now! said Burke



Relief showed on the faces of the boys of the panalau (colony) on their return to Honolulu after two classmates were killed by Imperial Navy shelling

The Kamehameha students are Walter Burke Blue Makua, James Coyle James Pease Thomas Bederman and Elvin Matson

They saw a blond head among the sailors and realized that the boat must be American It was destroyer Helm making the dash from Pearl Harbor to retrieve the colonists We found those guys living like Robinson Crusoe ' remembered Victor Dybdal

The boys threw off the brush cover and rushed to shore where the boat halted just at reef's edge In his haste Walter Burke cut his foot on a piece of jagged shrapnel buried in the sand Blood poured out and he was concerned the scent would attract sharks The Navy officer in charge of the boat refused to row to the other side of the island where the waters were quieter

Blue Makua swam back to shore and convinced Burke to swim for the boat Even sharks were better than the daily bombings from the Japanese Navy

Aboard Helm the Hawaiians learned that Richard Whaley and Joe Keliuhahanui had been killed by

the shelling on Howland and were buried there. Thomas Bederman and Elvin Matson were still in shock; their adventure turned tragic.

Skipper Chester Carroll secured from general quarters as the destroyer moved away from Baker and he came down to quiz the survivors. Just as they told the lieutenant commander that a Japanese bomber came over every day promptly at noon, they heard the sound of feet running on deck, always the first sign of impending danger on a destroyer. Dybdal looked at his watch, noon. As he gained the deck, a pair of bombs bracketed the destroyer. Dybdal could see the Mavis flying boat circling around for another run.

The aircraft made three passes, missing each time. By the third run, the destroyer's anti-aircraft guns were hosing the sky around it. The plane fled. Helm turned around and raced back to Pearl.

By the beginning of 1942, radar was in operation on these isolated islands and Japanese submarines couldn't get close without tipping their hand. After the month of aggressive shelling, Japanese submarine attacks against the islands thinned out.

Burke returned to Baker Island in 1943 and located the flag he had buried two years before. He took it home, where it remained until he passed away in 1990. The Amelia Earhart Lighthouse was restored to operating condition by the Coast Guard in 1963, part of a nationwide observance of Earhart's 65th birthday. In the 1950s, the bodies of Whaley and Kelihahanui were exhumed on Howland and reburied in the military cemetery at Schofield Barracks.

When I reminisce about those times, I realize that we were young and naive, recalled Pūanaia. I realize now that we were there to strengthen our position in the Pacific, and I'm only beginning to appreciate how important that was.

The opportunity to be left in nature is something youngsters don't have any more. Our companions were the birds. All we had were the four of us and nothing else. Perhaps that's how Adam and Eve could have felt in the Garden of Eden. Everything was so pristine.

Pūanaia later became head of the Hawaiian Studies Department at the University of Hawaii and director of Hawaiian Home Lands. The surviving members call themselves Hui Panalā'au, or society of colonizers.

Occasionally, the veterans of the brief colonization of the Equatorial Islands meet to remember their boyhood friends, and they unroll the American flag and let it fly over the graves of Whaley and Kelihahanui.

Portions of this story are excerpted from *Advance Force: Pearl Harbor* by Burl Burlingame, Naval Institute Press, 2002.

Email to Editorial Editor

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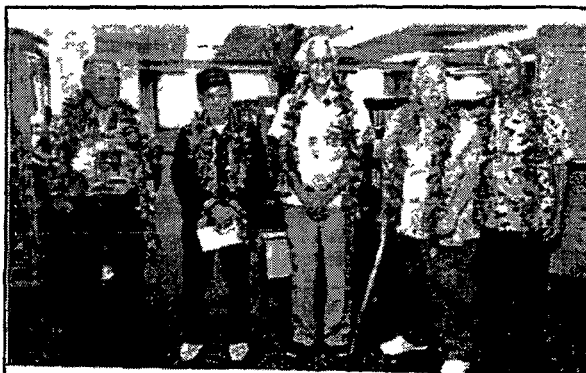
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>> Kamehameha Schools 2002 reception to honor the service of the Hui



Samuel Kalama 37 Kenneth Bell 35 James Carroll 37, Arthur Harris 37 George Kahanu 37



Dr. Michael Chun President and Headmaster of the Kapalama Campus, greets the surviving members of the hui

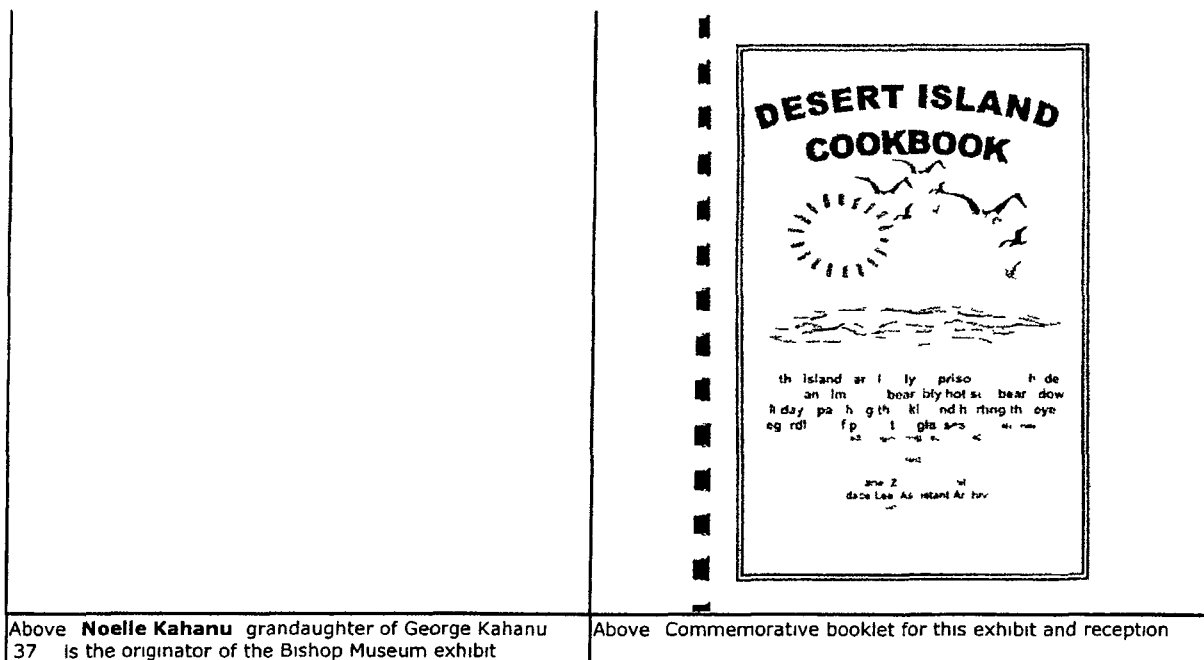


Above Friends and family gather for the ho okipa



Above **Janet Zisk** Kamehameha Schools Archivist organized the reception and worked to bring the exhibit to the Kapalama campus. She thanks participants and those who made this event possible





Above **Noelle Kahanu** granddaughter of George Kahanu
 37 is the originator of the Bishop Museum exhibit

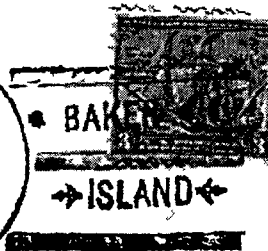
Above Commemorative booklet for this exhibit and reception

Where and why are you going? | Who went first? | What is Hui Panala au? | *Pioneering on Jarvis* by George West KSB 35 | 1942, the bitter end

Hui Panala au remembered, 2002 exhibit | 2002 reception

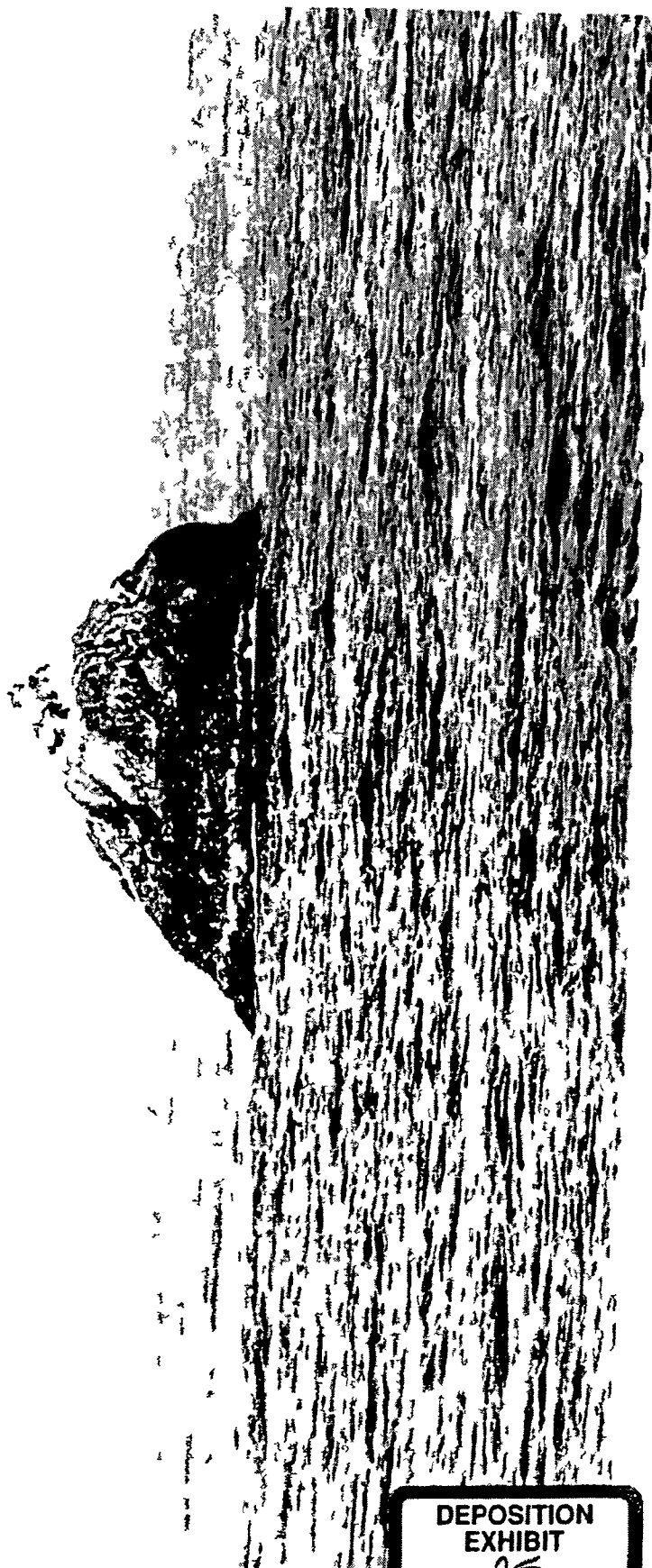
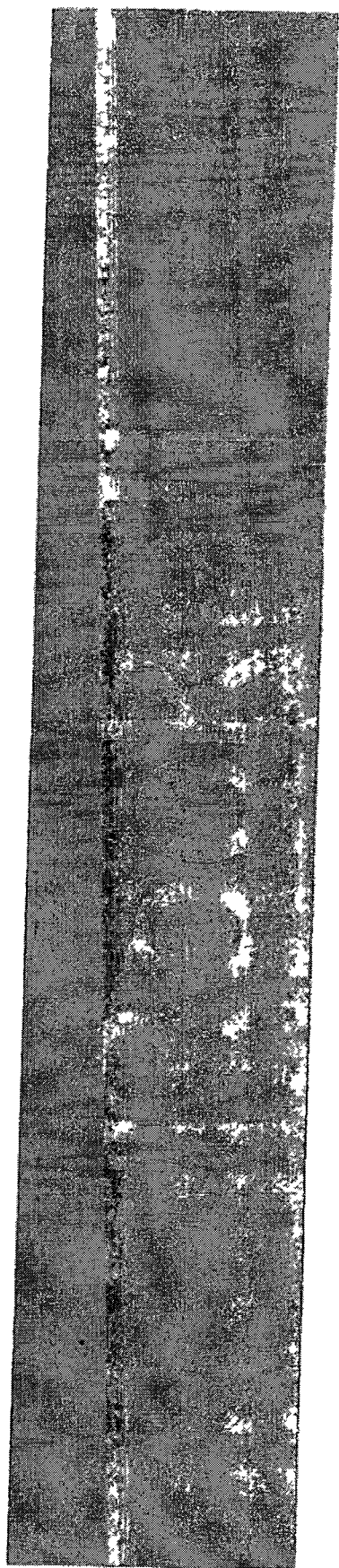
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DEPOSITION
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25

Attachment E

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Attorneys for Defendant and Claimant
MARSHALLS 201 and MARSHALL ISLAND FISHING COMPANY

US Attorney's Office
Districts of Guam & NMI

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UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

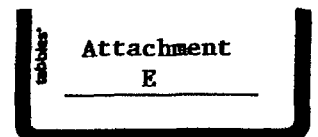
UNITED STATES OF AMERICA)	CIVIL CASE NO. 06-00030
)	
)	
Plaintiff)	
)	
v)	DECLARATION OF JON VAN
)	DYKE IN SUPPORT OF
MARSHALLS 201)	DEFENDANT'S MOTION TO
)	DISMISS
Defendant)	
_____)	

DECLARATION OF JON M. VAN DYKE

I JON M. VAN DYKE hereby declare under oath and penalty of perjury that

I am an attorney practicing law at 2515 Dole Street, Honolulu, Hawaii. I am also a Professor of Law at the University of Hawaii where I have taught international law for more than over 50 years. One of my specialties is international law of the sea. I have been retained as an expert on international law by the Defendant in this case. I make this Declaration upon personal knowledge with respect to the matters addressed in this Declaration and, if called

JPY



upon to tell this Court I could truthfully and competently testify to the following:

2. Based on customary international law and Article 121(c) of the United Nations Convention on Law of the Sea, it is my opinion that Baker and Howland Islands, territories of the United States located in the Pacific Ocean, are uninhabitable and have no economic life of their own, and therefore, that the United States is not authorized under international law to declare a 200 mile exclusive economic zones (EEZs) around them.

3. Article 121 of the 1982 Law of the Sea Convention reads as follows:

Article 121 Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

4. The term "rock" in Article 121(3) is not otherwise defined in the Law of the Sea Convention, but it is clear that a "rock" is a type of island and that this term has already been defined through subsequent international negotiations and the practice of states. In WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1965 (1971), "rock" is defined as "[a] mass of stone lying at or near the surface of the water, and a barren islet." Professor Jonathan I. Charney has explained that "the legal definition of 'rocks' need not conform to scientific or dictionary definitions." Jonathan I. Charney, *Rocks That Cannot Sustain Human Habitation*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 863-870 (1999). Whether a particular island or islet is a

SEP 2001 VOL 95 / NO 9

Whether the effect to be determined by applying the principles in the Law of the Sea Treaty, in light of other international precedent.

5. Article 121(5) of the Law of the Sea Convention makes it clear that a principal determinant regarding whether an insular structure is entitled to generate an exclusive economic zone is whether it can sustain human habitation or economic life of its own. The concept of "human habitation" must refer to some form of habitation that exists apart from a desire to enable an insular structure to generate extended maritime zones. It must be a habitation that exists for its own sake as part of an ongoing community that sustains itself and continues through the generations. This conclusion is supported by the views of the French diplomat Gidel, who emphasized during the 1934 debates on the status of islands that to qualify as an "island" a location had to have "natural conditions" that permitted a "stable residence of organized groups of human beings." GIDEL 3 LE DROIT INTERNATIONAL PUBLIC DE LA MER 684 (1934).

6. Some have argued that the "human habitation" language does not inevitably require that the insular feature be permanently inhabited, but it must require, at a minimum, that it provide support for a *nearby* stable community. It could, for instance, be visited on a regular basis by fishers from neighboring islands who use it as a base to harvest the living resources of the area. This linkage follows from the unitary nature of the phrase "capable of sustaining human habitation or economic life of their own" in Article 121(3). Something more is required as a commitment to the resources on or surrounding the insular structure greater than sending an occasional explorer or scientist to visit the insular feature.

⁷ This conclusion is supported by the opinion issued by Judge B. de V. Vukas of the International Tribunal for the Law of the Sea who recently explained that the underlying purposes for giving exclusive right over offshore resources to the coastal states through the establishment of the exclusive economic zone was to protect the economic interests of the coastal communities that depended on the resources of the sea and thus to promote their economic development and enable them to feed themselves. *Tolga (Russian Federation v. Australia) Prompt Release Judgment* Declaration of Judge Vukas ITLOS Reports 2002 <http://www.itlos.org/start2_en.html> This rationale he observed does not apply to uninhabited islands because they have no coastal fishing communities that require such assistance. *Id.*

8 State practice that supports the conclusion that isolated uninhabitable islands do not have the capacity to generate exclusive economic zones include

(a) the decision of the United Kingdom to refrain from declaring an EEZ around Rockall, a towering granite feature located 300 kilometers (190 miles) northwest of the nearest British territory. Fishery Limits Order (United Kingdom) S.I. 1997 No. 1750. *see generally* D.H. Anderson, *British Accession to the UN Convention on the Law of the Sea* 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 761-778 (1997) (citing House of Commons Hansard, vol. 298, written answers, col. 397).

(b) the statement issued by Republic of China (Taiwan) when ratifying the 1958 Convention on the Continental Shelf with reference to the Senkaku Diaoyudao Islands that determining the boundary of the continental shelf of the Republic of China, exposed rocks

and it shall not be taken into account. CHINA'S VIEWS ON MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW 156 and 170 n. 9 (1979) (citing Allen & Mitchell *The Legal Status of the Continental Shelf of the East China Sea* 51 ORECON LAW REV. 759 808 (1972)) (a view that has been joined by a prominent scholar from the People's Republic of China who has reported that the current position of the People's Republic of China is similar. China holds that the Diaoyudao Islands are small, uninhabited, and cannot sustain economic life of their own, and that they are not entitled to have a continental shelf. Ji Guoxing *The Diaoyudao (Senkaku) Disputes and Prospects for Settlement* 6 KOREAN JOURNAL OF DEFENSE ANALYSIS 285-306 (1994)).

(c) the statements made by the People's Republic of China that Japan's Okinotorishima Island is not entitled to generate an EEZ because it is uninhabitable. *China Says Okinotorishima a Mere Rock, Not an Island* THE DAILY YOMIURI (TOKYO) April 24 2004.

(d) the decisions made by both Nicaragua and Honduras that the five small cays east of their coasts (Bobel Cay, Savanna Cay, Port Royal Cay, South Cay, and Edinburgh Cay) should generate only 12 nautical mile territorial seas, and should not generate EEZs. *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, para. 137 (International Court of Justice, October 8, 2007), and

(e) the protests filed by Antigua and Barbuda, St. Kitts and Nevis, and Saint Vincent and the Grenadines to the use of tiny and uninhabited Aves Island in the Caribbean as a basepoint for claims to continental shelf and EEZ rights. Robert Bradley, Martin Pratt, and

EXHIBIT 1

Clive Sencer and Jon Van Dyke's *Economic* (1999) (Caulsden Financial Information Group 2000)

Dated this 26 day of October 2007

BY Jon M Van Dyke
JON M VAN DYKE

1 IN THE UNITED STATES DISTRICT COURT
2 OF THE TERRITORY OF GUAM
3 UNITED STATES OF AMERICA CIVIL NO
4 Plaintiff
5
6 ARSHALLS
7 Defendant

8
9
10 DEPOSITION OF ROBERT W SMITH
11 Taken on behalf of Defendant at the Offices of
12 NOAA Office of General Counsel Suite 1110 1601
13 Kapiolani Boulevard Honolulu Hawaii 96814
14 commencing at 8 57 a m on Friday November 2nd
15 2007 pursuant to Notice

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19 US Attorney's Office
Districts of Guam & NMI
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23 BEFORE PATRICIA ANN CAMPBELL CSR 103
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1 conform to a true series of straight baselines
2 The dots form a string of islands along the
3 coast of the mainland coast nor do the
4 objects create a deep indentation. But it is a
5 matter of some of these dichotomies within some of
6 the Law of the Sea provisions that a country can get
7 around 121 three and actually use perhaps what might
8 very well be an uninhabitable island that can not
9 sustain human habitation or have an economic life of
10 its own by incorporating it into a straight baseline
11 system

12 A couple of the examples that I believe
13 you brought out in Mr. Van Dyke's deposition the
14 other day was like China has definitely used rocks
15 as part of its straight baseline system and these
16 in my mind would come under a 121 three application
17 but they are able to use it

18 So yes I mean one of the very
19 important countries in the Law of the Sea
20 negotiations Fiji, they have a little feature
21 Ceva-Pi that sets apart from the rest of the Fijian
22 islands that I truly believe could come under a 121
23 three application but it has used it specifically
24 in their national law

25 Q Are you familiar with Professor Van

1 presently uninhabited or uninhabitable?

2 A Clearly the word that is in there is
3 uninhabitable not presently uninhabited

4 Q And would that include the opportunity
5 that an island could be inhabited?

6 A Correct you know given the technology
7 given the various views of the coastal state that
8 owns it you know the priorities they give it to
9 yes

10 Q Now this 121 three that's been applied
11 once by one state at Rockall how large was that
12 island?

13 A That rock you know I don't have the
14 dimensions in front of me but I believe it is on
15 record but you know it comes more in line with
16 the Hodgson definition of being like 50 meters
17 across sort of thing I mean truly in anybody's
18 definition of a rock would fit that definition I
19 mean this is one of these kind of articles that
20 it's like beauty you know it when you see it But
21 Rockall I truly believe was what was behind people's
22 minds when they negotiated this paragraph

23 Q There's a statement that you can stand
24 on one leg?

25 A Yeah you know there are many features

1 - under our sovereignty from which we have
2 developed maritime zones around I have ne er
3 visited those islands I ha e ne er been on those
4 islands but I have read reports Department of
5 Interior reports I like man, others have gone on
6 the web sites to you know read what's out there
7 I have -- you know I do know it's under US
8 sovereignty

9 Q And how do they compare with Rockall?

10 A They are clearly larger I mean they
11 do have dimensions They do have some sort of
12 vegetation granted not much but there is scrub
13 stuff There have been people on them in the past
14 prior to World War II There have been inhabitants
15 There is a runway on one of them So people have
16 lived on that island those islands the two of
17 them

18 Q And is that the only criteria under 121
19 three?

20 A The criteria is sustain -- the ability
21 to sustain human habitation or have an economic life
22 of their own

23 Q Now I don t recall this exactly but
24 there was an article that was cited by Professor Jan
25 Dyke where he cited it as supporting his

Attachment G

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE TERRITORY OF C A
3 UNITED STATES OF AMERICA CIVIL NO 6
4 Plaintiff
5 vs
6 MARSHALLS 201
7 Defendant)
8 -----)
9

10 DEPOSITION OF SCOTT BENTON EDMONDS
11 Taken on behalf of Plaintiff at the Offices of
12 NOAA Office of General Counsel Suite 1110 1601
13 Kapiolani Boulevard Honolulu Hawaii 96814
14 commencing at 9 02 a m on Thursday November 1st
15 2007 pursuant to Notice
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19 US Attorney &
Districts of Guam

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28 Certified Shorthand Reporter
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30 Notary Public State of Hawaii

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Honolulu Hawaii 96822 (808) 524 2090

1 right

2 Q Okay

3 A because it is stated to be an
4 equidistance line so one of the first jobs that I
5 had was to verify, is it an equidistance line?

6 Q And you did verify that right?

7 A I did. It's in paragraph number one of my
8 report and I found two minor discrepancies at both
9 ends of the line

10 Q Were those significant at all to this
11 case?

12 A I said that they weren't --

13 Q Right

14 A -- no

15 Q So you looked first at the Federal
16 Register that was your first job to do?

17 A That's correct. I looked at the
18 coordinates of the Federal Register and part of the
19 assessment process is to create a base map which I
20 could plot everything on so I began by setting out
21 the potential maritime claims for both Baker and
22 Howland Island and Phoenix group and --

23 Q You said potential maritime claims. Are
24 you aware of what the maritime claims are of Howland
25 and Baker and Kiribati?

1 A I am aware of the claims that the S
2 Government has to an equidistance line between the
3 two

4 Q And how about Kiribati?

5 A I am aware that in their maritime
6 legislation that they claim that where they overlap
7 neighboring states that it would be an equidistance
8 line

9 Q Okay so that's the law in Kiribati that
10 you found out about?

11 A That's my understanding yes

12 Q So you knew that there was a median line
13 in the Kiribati law and that there was a line in
14 the US law?

15 A I knew that their position was an
16 equidistance line if they overlapped with
17 neighboring states Now I never saw a set of
18 coordinates that they had published

19 Q Oh okay okay So what did your
20 research find about the equidistance line of the
21 United States?

22 A Well I found that from point two to
23 point fourteen my equidistance line and the
24 coordinates of the United States matched almost
25 perfectly

MARITIME ARE BETWEEN THE 5 POSSESSIONS OF
HOWLAND BA ISLANDS AND KIRIBATI

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Pacific
Ocean

Howland Island and P. K. L. O.

Howland Island and P. K. L. O.

P. K. L. O.

Howland Island and P. K. L. O.

KIRIBATI

P. K. L. O.

MARITIME AREA BETWEEN THE U.S. POSSESSIONS OF
HOWLAND, MIDWAY ISLANDS AND KIRIBATI

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Howland Island,
Baker Island

Pacific
Ocean

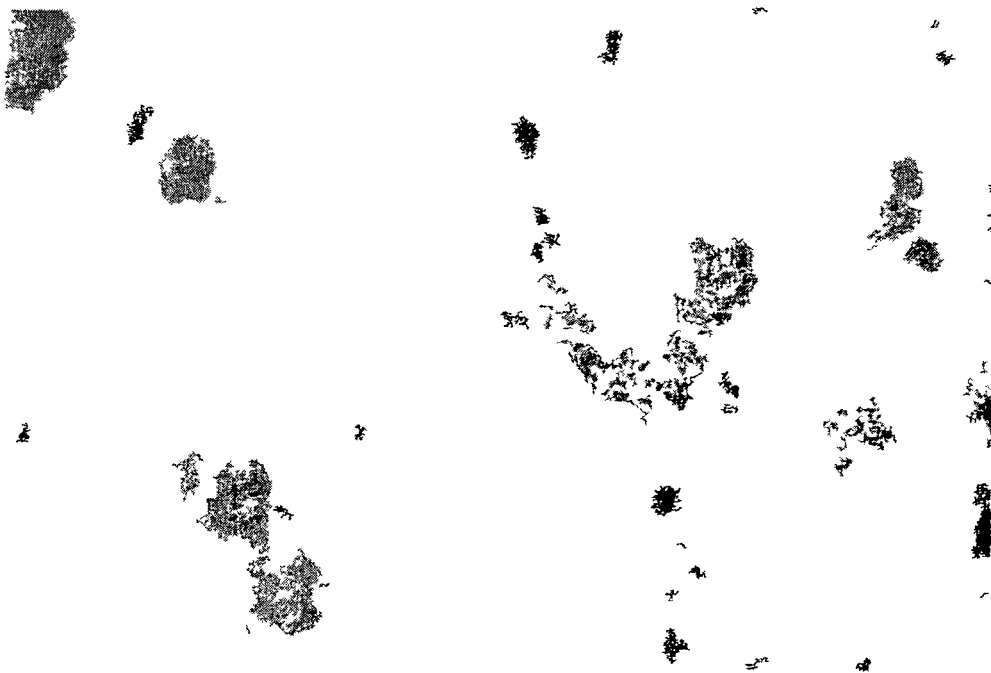
KIRIBATI

KIRIBATI

- Baker Island

Lat 0 195 Lon 176 475

Baker Island



- STS092-715-36
- 21 October 2001
- 00 26 UTC

DEPOSITION
EXHIBIT

Baker Island located only 20 km north of the equator in the central Pacific lies to the northeast of the _____ (of which Baker Island can be considered as a distant outlier) and 58 km south of _____ (its nearest neighbour). Both Baker and Howland are unincorporated territories of the US under the jurisdiction of the US Fish & Wildlife Service. The USFWS manage the island as the Baker Island National Wildlife Refuge.

The island is a low and flat oval shaped coralline island of 1.6 km² in area with a circumference of nearly 5 km. Baker Island displays many of the features that are common among the remote islands of the central Pacific: the island is surrounded by a narrow fringing reef, has no central lagoon, and rises from the shoreline in a steep beach-crest before descending to an interior depression. Beaches on the island are composed of coral rubble, shingle and coarse sands.

Climate is dry and windy — a fact that is reflected by the island's sparse vegetation cover. Vegetation consists of low grasses (such as *Digitaria pacifica*), vines such as the Puncture vine (*Tribulus cistoides*) and

8

... as well as the Purslane (*Portulaca lutea*)

The Baker Island National Wildlife Refuge protects mainly the marine environment around the island. In all some 123 km² of shallow water habitats are protected providing refuge for a wide range of corals, invertebrates and fish species as well as for both the Green and Hawksbill Turtles. On land the NWR protects nesting habitat for around 20 species of bird including Lesser Frigate birds (*Fregatta ariel*) Sooty Tern (*Sterna fuscata*) Laysan Booby (*Sula dactylatra*) Red footed Booby (*S.ula*) and Brown Booby (*S. leucogaster*)

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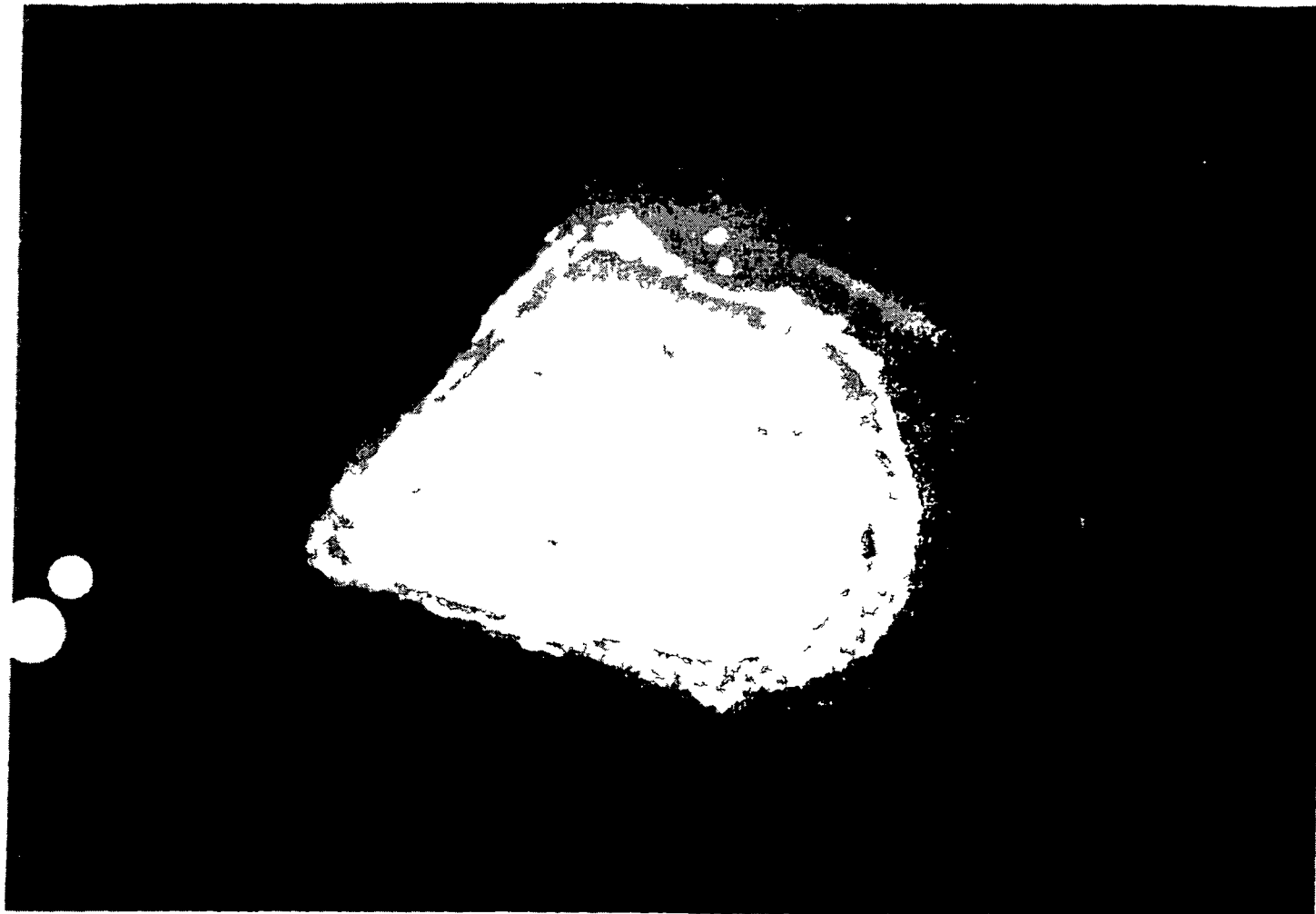
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aker Island



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Baker Island Travel Guide

Ads by Google

Baker Island is a small, remote island in the Pacific Ocean, located about 1,600 miles northwest of Hawaii. It is a small, sandy island with a few palm trees and a few small buildings. Baker Island was discovered by the United States Navy in 1856. It was named after the American ship that discovered it, the USS Albatross. Baker Island was used as a military base during World War II. It is now a part of the Line Islands National Monument. Baker Island is a beautiful island with a lot of history. It is a great place to visit if you are looking for a quiet, remote location. Baker Island is a great place to visit if you are looking for a quiet, remote location. Baker Island is a great place to visit if you are looking for a quiet, remote location.



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Atlantic City
 Hotels

For information on
 at Vikivoyage.org

SMITH MIGHTS RESERVE